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No. 84-1491-ASX
Status: GRANTED

Title: Philadelphia Newspapers, Inc., et al., Appellants
v.
Maurice S. Hepps, et al.

Docketed:
March 14, 1985

Court: Supreme Court of Pennsylvania,
Eastern District

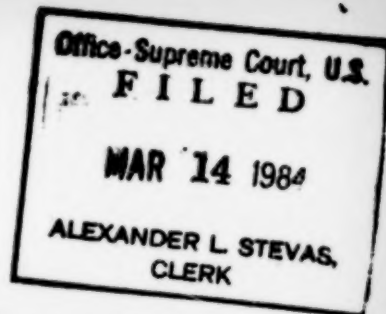
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84-1672

Counsel for appellant: Marion, David H.

Counsel for appellee: Rome, Edwin P., Shestack, Jerome J.

Entry	Date	Note	Proceedings and Orders
1	Mar 14 1985	G	Statement as to jurisdiction filed.
2	Apr 12 1985		Motion of appellees Maurice S. Hepps, et al. to dismiss or affirm filed.
3	Apr 17 1985		DISTRIBUTED. May 9, 1985
4	Jun 4 1985		REDISTRIBUTED. June 20, 1985
5	Jun 4 1985		REDISTRIBUTED. June 20, 1985
6	Jun 24 1985		PROBABLE JURISDICTION NOTED. *****
7	Aug 7 1985	P	Motion of Capital Cities Communications, Inc., et al. for leave to file brief as amici curiae filed.
9	Aug 7 1985		Order extending time to file brief of appellant on the merits until August 19, 1985.
10	Aug 19 1985		Joint appendix filed.
11	Aug 19 1985		Brief of appellant Philadelphia Newspapers, Inc. filed.
12	Aug 19 1985		Brief amicus curiae of AFL-CIO filed.
13	Aug 19 1985		Brief amicus curiae of Print and Broadcast Media and Organizations filed.
14	Aug 19 1985		Brief amicus curiae of ACLU, et al. filed.
15	Sep 6 1985		Record filed.
17	Sep 16 1985		Order extending time to file brief of appellee on the merits until September 30, 1985.
18	Sep 18 1985		Brief amicus curiae of American Legal Foundation filed.
19	Sep 28 1985		Brief of appellees Maurice S. Hepps, et al. filed.
20	Oct 17 1985		LIQUIDATED.
21	Oct 22 1985		SET FOR ARGUMENT, Tuesday, December 3, 1985. (2nd case).
22	Nov 26 1985	X	Reply brief of appellant Philadelphia Newspapers, Inc. filed.
23	Dec 3 1985		ARGUED.

84-1491 (1)



No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PHILADELPHIA NEWSPAPERS, INC., et al.

Appellants

v.

MAURICE S. HEPPS, et al.

Appellees

**On Appeal From The Judgment of the Supreme Court
of Pennsylvania**

JURISDICTIONAL STATEMENT

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104 pp

QUESTIONS PRESENTED BY THE APPEAL

A.

Did the Supreme Court of Pennsylvania err in upholding the constitutionality of a Pennsylvania statute which requires a defendant publisher to bear the burden of proving the truth of its publication as a defense to a private figure defamation action?

B.

May a private figure libel plaintiff recover damages from a newspaper defendant without proving the falsity of the complained-of publication?

C.

Can the falsity of a publication constitutionally be *presumed* solely from the defamatory character of the words used?

CITATIONS TO OPINIONS

The Opinion of the Supreme Court of Pennsylvania, which appears in the Appendix, is reported at ____ Pa. ____, 485 A.2d 374 (1984).

The Opinion of the trial court, which also appears in the Appendix, has not been officially reported. An earlier opinion of the trial court, dealing with pretrial discovery matters, is reported at 3 Pa.D&C3d 693 (Chester Cty. C.P. 1977).

LIST OF ALL PARTIES

The parties to the proceeding in the Supreme Court of Pennsylvania were as follows:

Appellants: Philadelphia Newspapers, Inc.
William Ecenbarger
William Lambert

Appellees: Maurice S. Hepps
General Programming, Inc.
A. David Fried, Inc.
Brookhaven Beverage
Distributors, Inc.
Busy Bee Beverage Co.
ALMIK, Inc.
Lackawanna Beverage Distributors
N.F.O., Inc.
Elemar, Inc.

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STATEMENT OF JURISDICTIONAL GROUNDS

1. The underlying action is a suit for defamation by plaintiffs held to be private figures by the trial court. After a six-week trial, the trial judge, holding invalid a Pennsylvania statute which required the defendant to bear the burden of establishing the truth of its publication as a defense to the action, charged the jury that plaintiffs bore the burden of establishing the falsity of the publications in issue. From the trial court's denial of post-trial motions, plaintiffs filed a direct appeal to the Pennsylvania Supreme Court pursuant to 42 Pa.C.S. §772(7). In an opinion entered December 14, 1984, the court upheld the validity of the challenged statute, reversed the order of the trial court denying post-trial motions, and awarded plaintiffs a new trial.

2. Judgment was entered by the Supreme Court of Pennsylvania on December 14, 1984, and a Notice of Appeal was filed with the Pennsylvania Supreme Court on March 14, 1985. Copies of the Judgment and Notice of Appeal are set forth in the Appendix.

3. Jurisdiction of this Court is conferred by 28 U.S.C. §1257(2) in that there is drawn into question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States, and the decision of the highest state tribunal was in favor of the statute's validity.

4. The provisions of 28 U.S.C. §2403(b) may be applicable and, accordingly, service of this Jurisdictional Statement has been made upon the Attorney General of the Commonwealth of Pennsylvania.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment I:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

2. United States Constitution, Amendment XIV, §1:

" . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

3. Pennsylvania Consolidated Statutes, 42 Pa.C.S. §8343, Act of July 9, 1976, P.L. 586, No. 142, §2:

"§8343. BURDEN OF PROOF

(a) *Burden of plaintiff.* In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

- (1) The defamatory character of the communication.
- (2) Its publication by the defendant.
- (3) Its application to the plaintiff.
- (4) The understanding by the recipient of its defamatory meaning.
- (5) The understanding by the recipient of it as intended to be applied to the plaintiff.
- (6) Special harm resulting to the plaintiff from its publication.
- (7) Abuse of a conditionally privileged occasion.

(b) *Burden of defendant.* In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

- (1) The truth of the defamatory communication.
- (2) The privileged character of the occasion on which it was published.
- (3) The character of the subject matter of defamatory comment as of public concern."

STATEMENT OF THE CASE

A. Procedural History

This action for libel under the laws of the Commonwealth of Pennsylvania was instituted in May 1976 in the Court of Common Pleas of Chester County, Pennsylvania. Plaintiffs were Maurice S. Hepps, principal stockholder of General Programming, Inc. ("General"), General, and a number of independent corporate entities which operated beer and beverage distributorships as franchisees of General. Plaintiffs complained of a series of articles published in *The Philadelphia Inquirer*¹ which allegedly "linked" them to certain "underworld" figures.

Although the articles in suit concerned plaintiffs' involvement with, *inter alia*, high-ranking officers of the Commonwealth of Pennsylvania, the trial court, in a pre-trial order denying defendants' Motion for Summary Judgment, ruled that plaintiffs were "private figures" who could recover for defamation upon a showing of negligence.

Trial of the action commenced on June 8, 1981 and consumed six weeks. Plaintiffs expressly alleged falsity in their Complaint, and plaintiffs' counsel argued falsity vehemently and repeatedly in his opening remarks to the jury. In its instructions to the jury, the trial court charged that plaintiffs bore the burden of proving the falsity of the complained-of publications. On July 13, 1981, the jury returned a general verdict in favor of defendants. A timely Motion for New Trial contested, *inter alia*, the court's refusal to follow the Pennsylvania "Burden of Proof" statute, 42 Pa.C.S. §8343, which places the burden of proving truth upon defendant. The Motion for a New Trial was denied by Order dated December 21, 1982, and final judgment was entered on February 15,

1. Appellant Philadelphia Newspapers, Inc. is the publisher of *The Philadelphia Inquirer*. The individual appellants are reporters for *The Inquirer*.

1983. The trial court's lengthy Opinion entered on October 24, 1983, held, *inter alia*, that the common law rule embodied in Pennsylvania's Burden of Proof statute, which places upon a publisher the burden of proving the truth of its publication as a defense to the action, was violative of the First Amendment.

Following the entry of judgment, plaintiffs filed a direct appeal to the Pennsylvania Supreme Court, which permits such appeals where a trial level court of general jurisdiction has held a state statute invalid as repugnant to the Constitution of the United States. 42 Pa.C.S. §722(7). In an Opinion dated December 14, 1984, that court held² "that in a libel suit brought by a private individual for compensatory damages resulting from the defamatory material, the presumption of falsity remains and the defendant has the option of proving truth as an absolute defense to the action." ____ Pa. ____, 485 A.2d at 387.

B. Facts

Between May 5, 1975, and May 2, 1976, five news articles were published in *The Philadelphia Inquirer* concerning plaintiffs, who at that time were known as the "Thrifty Beverage" chain. As characterized by the plaintiffs, the thrust of these news articles was that:

(a) Former State Senator Frank Mazzei, a convicted felon, used political influence to allow the Thrifty chain, in which he owned an interest, to continue to do business even though it was operating in violation of state law;

(b) Senator Mazzei's motivation for protecting the Thrifty chain was not limited to his financial in-

2. Two of the seven members of the Pennsylvania Supreme Court recused themselves from participation in the hearing or decision of this matter due to the pendency of their own defamation actions against the corporate defendant herein.

terest, but also extended to the fact that the chain had a variety of ties to organized crime through one Joseph Scalleat and others; and

(c) Therefore, the Thrifty chain was closely connected with organized crime.

Throughout the course of the trial, plaintiffs attempted to refute what they perceived as the thrust of the articles with evidence designed to show that they were not connected with organized crime, that they were not operating in violation of state law, and that Senator Mazzei had not used improper political influence on their behalf.

REASONS WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. This Court has Previously Determined that the Questions Presented Herein Were so Substantial as to Require Review

The questions presented in this appeal raise issues of substantial concern to the media generally and, ultimately, to the reading public. Indeed, this Honorable Court previously has recognized the importance of the identical issues in granting a Writ of Certiorari in *Wilson v. Scripps-Howard Broadcasting Company*, 642 F.2d 371 (6th Cir.), *cert. granted*, 454 U.S. 962, *cert. dismissed pursuant to Rule 53*, 454 U.S. 1130 (1981). In *Wilson*, this Court issued the Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit upon the following question:

"A. Did the Court of Appeals err in holding that the First and Fourteenth Amendments to the United States Constitution require that private-figure libel plaintiffs bear the burden of proving the falsity of a

defamatory communication in contravention to State law?³

Courts throughout the country have been grappling with the issue of whether private libel plaintiffs must prove falsity — and reaching widely divergent results — since this Court decided *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Decisions in 12 jurisdictions seem to require that a private defamation plaintiff prove falsity;⁴ two states require the plaintiff to prove falsity where the publication involves matters of public interest;⁵ and two additional states have suggested that plaintiff must prove

3. Two other subsidiary questions also were set forth in the Petition for a Writ of Certiorari, as follows:

“B. If the Court of Appeals was correct in its ruling on the burden of proof issue, did the jury instructions in this case, in fact, allocate to plaintiff the burden of proving falsity?”

“C. If the Court of Appeals was correct in ruling on the burden of proof issue, was the evidence in this case sufficient to support a jury finding that the defamatory communication at issue was false?”

4. *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 448 A.2d 1317 (1982); *Harrison v. Washington Post Company*, 391 A.2d 781 (D.C. 1978); *Smith v. Taylor County Pub. Co., Inc.*, 443 So.2d 1042 (Fla. Dist. Ct. App. 1983); *Applestein v. Knight Newspapers, Inc.*, 337 So.2d 1005 (Fla. Dist. Ct. App. 1976); *Troman v. Wood*, 62 Ill.2d 184, 340 N.E.2d 292 (1975); *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976); *Brennan v. Globe Newspaper Co.*, 9 Med. L. Rptr. (BNA) 1147 (Mass. Super. 1982); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980); *Anton v. St. Louis Suburban Newspapers, Inc.*, 598 S.W.2d 493 (Mo. Ct. App. 1980); *Madison v. Yunker*, 589 P.2d 126 (Mont. 1978); *Brown v. Boney*, 41 N.C. App. 636, 255 S.E.2d 784, cert. denied, 298 N.C. 294, 259 S.E.2d 910 (1979); *Hersch v. E. W. Scripps Co.*, 3 Ohio App.3d 367, 445 N.E.2d 670 (1981); *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976), cert. denied, 429 U.S. 1123 (1977).

5. *Ross v. Gallant, Farrow & Co.*, 27 Ariz. App. 89, 551 P.2d 79 (1976); *Fairley v. Peekskill Star Corp.*, 83 App. Div.2d 294, 445 N.Y.S.2d 156 (1981).

falsity.⁶ In addition to Pennsylvania, four states appear to have retained the common law presumption that defamatory words are false and that, if raised, the defense of truth must be proven by the defendant.⁷ Within some jurisdictions, decisions on the burden of proof issue appear to conflict.⁸ And, finally, 27 jurisdictions have not decided, post-*Gertz*, whether a private plaintiff must prove falsity or whether the media defendant bears the burden of providing truth.⁹

6. *Diaz v. Oakland Tribune, Inc.*, 139 Cal. App.3d 118, 188 Cal. Rptr. 762 (1983); *McCall v. Courier Journal and Louisville Times Co.*, 623 S.W.2d 882 (Ky. 1981), cert. denied, 456 U.S. 975 (1982).

7. *Gobin v. Globe*, 229 Kan. 1, 620 P.2d 1163 (1980); *Rogozinski v. Airstream By Angell*, 152 N.J. Super. 133, 377 A.2d 807 (1977), modified, 164 N.J. Super. 465, 397 A.2d 334 (1979); *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976); *Denny v. Mertz*, 106 Wis.2d 636, 318 N.W.2d 141, cert. denied, 456 U.S. 883 (1982).

8. *Compare Elliott v. Roach*, 409 N.E.2d 661 (Ind. App. 1980) (defendant bears burden of proving truth) with *Local 15 v. International Brotherhood of Electrical Workers*, 273 F. Supp. 313 (N.D. Ind. 1967) (applying Indiana law) (plaintiff must prove falsity); *compare Trahan v. Ritterman*, 368 So.2d 181 (La. App. 1st Cir. 1979) (falsity presumed where words are defamatory *per se*) with *Ward v. Sears, Roebuck & Co.*, 339 So.2d 1255 (La. App. 1st Cir. 1976) (plaintiff must prove falsity); *compare Wilson v. Scripps-Howard Broadcasting Company*, 642 F.2d 371 (6th Cir.), cert. granted, 454 U.S. 962, cert. dismissed pursuant to Rule 53, 454 U.S. 1130 (1981) (plaintiff must prove falsity) with *Memphis Pub. Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978) (defamatory statements are presumed false).

9. Alabama, Alaska, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Iowa, Maine, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming.

B. The First and Fourteenth Amendments to the United States Constitution Mandate that No Liability be Imposed Upon Speech Not Proven to be False

In *Bose Corporation v. Consumers Union*, ____ U.S. ____, 80 L.Ed.2d 502 (1984), this Court re-emphasized that in cases raising First Amendment issues appellate courts are obligated to ensure that there is no "forbidden intrusion on the field of free expression." *Id.* at 515, citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In the process of "categorizing" speech, First Amendment protection has been denied only to that narrow category of speech demonstrated to be "no essential part of any exposition of ideas, and . . . of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

Prior to this Court's opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), libelous speech about private affairs was deemed to be outside the area of First Amendment protection. *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952). *Gertz* recognized, however, that even purely private speech is deserving of constitutional protection, holding that only "false statements of fact" published with "fault" were outside the sphere of the protected zone. *Id.* at 340, 347. Indeed, the rationale of this Court's decisions granting constitutional protection to pure commercial speech is essentially the same as that involved in the libel area, *viz.* all speech, except "false statements of fact," has constitutional value. *Bose, supra*, 80 L.Ed.2d at 519, n.22, quoting *Gertz, supra*. Conversely, because truthful speech cannot be deemed to be outside of the zone of legitimate expression, such speech is entitled to full constitutional protection. Moreover, *Gertz* recognized that because it is necessary to provide "breathing space" for the exercise of First Amendment freedoms, *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963), even

false statements of fact are entitled to constitutional protection if made without fault. *Gertz, supra*, 418 U.S. at 347.

Under the Pennsylvania Burden of Proof statute, the validity of which was upheld by the Pennsylvania Supreme Court by the judgment now under review, liability may be imposed without proof that the publication is outside of the protected zone, *i.e.*, false. The logic of *Gertz*, however, requires that no liability be imposed unless plaintiff is able to demonstrate, by either clear and convincing evidence or, at a minimum, a preponderance of the evidence, that the publication is false.

Following *Gertz*, the Restatement (Second) of Torts §580B, comment j, recognized that the burden of proving falsity must be placed upon plaintiff. The comment notes:

"The burden of proof of showing fault is undoubtedly upon the plaintiff. If the plaintiff has the burden of showing that the defendant was negligent in failing to ascertain the falsity or the defamatory character of the statement or that he acted recklessly or knowingly in this regard, there remains little, if any, significance in the common law position that truth of the statement is a defense to be raised by the defendant and on which he has the burden of proof. (See Section 581A). As a practical matter, in order to meet the constitutional obligation of showing defendant's fault as to truth or falsity, the plaintiff will necessarily find that he must show the falsity of the defamatory communication."

See also *id.*, §581A, comment b; §613. And the Court of Appeals of Maryland, addressing the issue directly in *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688, 698 (Md. 1976), stated that, "under the negligence standard which we adopt here, truth is no longer an affirmative defense . . . but instead the burden of proving falsity rests upon the plaintiff, since, under this standard,

he is already required to establish negligence with respect to such falsity." *Accord, Jenoff v. Hearst Corp.*, 644 F.2d 1004, 1008 (4th Cir. 1980).

As noted in part A above, the Sixth Circuit's decision in *Wilson v. Scripps-Howard*, *supra*, confirms that the Gertz fault requirement imposes the burden of proving falsity on the private figure libel plaintiff. Addressing the issue of "whether in light of Gertz the First Amendment controls the question of who has the burden of proof on the issue of truth or falsity when the plaintiff is not a public figure," the Sixth Circuit held that "[a]s a matter of federal First Amendment law, the burden must be placed on the plaintiff to show falsity." *Id.* at 374, 376. Its reasoning, *id.* at 375 (emphasis added) (footnote deleted), was as follows:

"It would ordinarily be impossible to determine whether the defendant exercised reasonable care and caution in checking on the truth or falsity of a statement without first determining whether the statement was false. *The publisher's carelessness must have caused an error in accuracy, an error in failing to ascertain that the defamatory statement was false.* The two elements of carelessness and falsity are inevitably linked, for a defendant should not be liable if it 'took every reasonable precaution to insure the accuracy of its assertions.' *Gertz, supra*, 418 U.S. at 346. Fault then must be held to consist of two elements: carelessness and falsity.

"In order for the jury to decide the issue of fault, it must weigh together and balance the facts concerning falsity and the facts concerning carelessness. The degree of uncertainty in the juror's mind on the issue of truth and the degree of uncertainty on the issue of carelessness must be taken into account at the same time in arriving at a conclusion on the issue of fault. Fairness and coherent consideration of the issue lead us to the conclusion that the party with

the burden of proving carelessness must also carry the burden of proving falsity as a part of the concept of fault."

CONCLUSION

The allocation of the burden of proving truth or falsity in private figure defamation actions raises substantial constitutional issues which have been the subject of numerous decisions by state courts since this Court's decision in *Gertz, supra*.

The possibility that a defamation award can be premised upon truthful speech, or at least upon speech not proven to be false, presents an issue of fundamental import. This Court has previously recognized the importance of this issue in granting a Petition for Writ of Certiorari.

The instant action, which presents the Court with a full trial record and lengthy opinions of both the state trial and appellate courts and which isolates the "burden of proof" issue with unusual clarity, is appropriate for plenary consideration by this Court.

Accordingly, appellants respectfully urge this Court to note probable jurisdiction and grant plenary consideration of the questions presented herein, with briefs on the merits and oral argument.

Respectfully submitted,

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APPENDIX

APPENDIX

1. Opinion of the Pennsylvania Supreme Court dated December 14, 1984 A-1
2. Opinion of The Honorable Leonard Sugerman of the Court of Common Pleas of Chester County, Pennsylvania dated October 24, 1983..... A-29
3. Judgment entered by the Pennsylvania Supreme Court on December 14, 1984 A-81
4. Notice of Appeal filed in the Pennsylvania Supreme Court on March 14, 1985..... A-83

APPENDIX 1

[J-66-1984]

IN THE SUPREME COURT OF PENNSYLVANIA Eastern District

MAURICE S. HEPPS, et al. : No. 18 E.D. Appeal Dkt. 1983
:
v. :
: Appeal from the Order of the
PHILADELPHIA NEWSPAPERS, : Court of Common Pleas of
INC., WILLIAM ECENBARGER, : Chester County dated Feb-
and WILLIAM LAMBERT : ruary 15, 1983, entered at
: No. 36 May Term, 1976.
Appeal of MAURICE S. HEPPS, :
et al. : ARGUED: April 9, 1984

OPINION

NIX, C. J.

FILED: DECEMBER 14, 1984

The instant civil libel action resulted from a series of five "investigative" articles appearing in *The Philadelphia Inquirer* which purported to link Maurice S. Hepps, General Programming, Inc. and a number of independent corporate entities who operated beer and beverage distributorships as franchises of General Programming, Inc. to certain named "underworld" figures and to organized crime generally. Maurice Hepps, the individual plaintiff-appellant was the principle stockholder of the corporate plaintiff-appellant, General Programming, Inc. ("General"). General owns the trademarks "Thrifty Beverage" and "Brewer's Outlet," and licenses such marks and provides management and consultation services to licensees. The remaining corporate and individual plaintiff-appellants, approximately nineteen in number, are li-

censees of General. As a result of these articles, the plaintiff-appellants instituted a civil action in libel against Philadelphia Newspapers, Inc., the publisher of the newspaper in question, and William Ecenbarger and William Lambert, the reporters who prepared the series of articles.

After a six-week trial, the jury returned a general verdict in favor of defendant-appellees. Plaintiff-appellants based their challenge to the judgment rendered below upon the trial court's decision to instruct the jury that the plaintiff bears the burden of proving the falsity of the defamatory publication. This instruction was given after the trial court had ruled that 42 Pa. C.S. §8343(b)(1) was unconstitutional in that it requires the defendant in a civil libel suit to establish the truth of the defamatory publication by way of an absolute defense to the action. Plaintiff-appellants also appeal the trial court's dismissal of their claim for punitive damages. This direct appeal seeking the award of a new trial is entertained by this Court pursuant to 42 Pa. C.S. §722(7).

I.

It has long been the decisional law of this Commonwealth that truth is a complete defense to a civil action for libel, and that the burden of proving truth rests upon the defendant. *Matson v. Margiotti*, 371 Pa. 188, 88 A.2d 892 (1952); *Kilian v. Doubleday & Co., Inc.*, 367 Pa. 117, 79 A.2d 657 (1951); *Montgomery v. Dennison*, 363 Pa. 255, 69 A.2d 520 (1949); *Mulderig v. Wilkes Barre Times*, 215 Pa. 470, 64 A. 636 (1906); *Burkhart v. North American Co.*, 214 Pa. 39, 63 A. 410 (1906); *Bryant v. Pittsburgh Times*, 192 Pa. 585, 44 A. 251 (1899); *Wood v. Boyle*, 177 Pa. 620, 35 A. 853 (1896); *Collins v. Dispatch Pub. Co.*, 152 Pa. 187, 25 A. 543 (1893); *Conroy v. Pittsburgh Times*, 139 Pa. 334, 21 A. 154 (1891); *McLenahan v. Andrews*, 135 Pa. 383, 19 A. 1039 (1890);

Press Co. v. Stewart, 119 Pa. 584, 14 A. 51 (1888); *Rowan v. DeCamp*, 96 Pa. 493 (1880); *Barr v. Moore*, 87 Pa. 385 (1878); *Burford v. Wible*, 32 Pa. 95 (1858); *Crapman v. Calder*, 14 Pa. 365 (1850); *Steinman v. McWilliams*, 6 Pa. 170 (1847). In 1953, this common law principle was codified in the Act of August 21, 1953, P.L. 1291, No. 363, §1(2)(a), 12 P.S. §1584a(b)(1) (Repealed 1978), which provided:

In an action for defamation, the defendant has the burden of proving, when the issue is properly raised;

The truth of the defamatory communication.

The provision was reenacted in the Judicial Code on July 19, 1976, effective June 27, 1978, 42 Pa. C.S. §8343(b)(1):

Burden of defendant.—In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

The truth of the defamatory communication.

* * *

Thus the section now being challenged is the codification of the decisional law as it has developed over the last century in this Commonwealth on this subject. We are now called upon to determine whether section 8343(b)(1), which places upon the defendant in a libel suit the burden of proving the truth of defamatory statements, is constitutionally infirm in view of the relatively recent interpretations of the First Amendment of the United States Constitution as expressed by the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. See, e.g., *Bose Corp. v. Consumers Union of U.S., Inc.*, ___ U.S. ___, 80 L.Ed. 2d 502 (1984); *Wolston v. Reader's Digest Ass'n., Inc.*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Herbert v. Lando*, 441

U.S. 153 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Greenbelt Cooperative Publishing Ass'n. v. Bresler*, 398 U.S. 6 (1970); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

A.

Before examining the United States Supreme Court decisions relating to the impact of the First Amendment upon this area of the law, it is instructive to briefly review the Pennsylvania law of libel as it has developed over the years. The underlying premise concerning the character of the defamed individual is the principle that any man accused of wrong-doing is presumed innocent until proven guilty. The decisions reasoned this principle transcended the criminal law and was equally applicable to the ordinary affairs of life. *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 448-49, 273 A.2d 899, 907 (1971). *Montgomery v. Dennison*, *supra* at 263 n.2, 69 A.2d at 525 n.2. Based upon this premise we developed the rule that in actions for defamation, the general character or reputation of the plaintiff is presumed to be good. *Corabi*, *supra* at 449, 273 A.2d at 908; *Klumph v. Dunn*, 66 Pa. 141, 147 (1870); *Hartranft v. Hesser*, 34 Pa. 117, 119 (1859); *Chubb v. Gsell*, 34 Pa. 114, 116 (1859). Since the gravamen of defamation is that the words uttered or written tend to harm the reputation, a consequence of the rule presuming the good reputation of the plaintiff was a presumption of the falsity of the defamatory words. *Corabi*, *supra*; *Hartranft v. Hesser*, *supra*.

Evidentiary considerations have also been offered to justify the presumption. As noted by this Court in *Corabi*:

Moreover, it is manifestly the fair thing to place upon the defendant the burden of proving truth: *Montgomery v. Dennison*, *supra* n.2 at 263; 9 Wigmore, Evidence §2486, at 276 (3d ed. 1940). Although not invariably so, it is preferable to place the burden of proof upon the party having in form the affirmative allegation and/or upon the party who presumably has peculiar means of knowledge of the particular fact in issue: See Wigmore, Evidence §2486, *supra*. For example, in the context of libel, if the written communication accuses plaintiff of being a murderer, a burglar or a prostitute, the defendant knows precisely what particular event he is referring to and the source of his information, whereas the plaintiff, not knowing these facts, would experience great difficulty in refuting these general charges by showing their falsity.

Id. at 450-451; 273 A.2d at 908-09 (footnotes omitted).

Particularly, where the accusation is totally general and without the specificity necessary for a response, the absence of such a presumption would force the plaintiff in the unenviable position of proving the negative. *Corabi*, *supra* at 450, 273 A.2d at 907; *Conroy v. Pittsburgh Times*, *supra* at 339, 21 A. at 156.¹

1. Another rationale offered to support the presumption of the good character or innocence of the plaintiff was the view that it would be unduly prejudicial to the defendant to permit the plaintiff to prove his general good character in the plaintiff's case-in-chief. In *Hartranft v. Hesser*, 34 Pa. 117, 119 (1859), it was stated that the plaintiff is not permitted to prove his general good character because to permit such evidence would be to take advantage of the defendant who was unapprised of its nature or to raise a collateral issue not made by the pleadings in the case. *Id.* Thus, character evidence in

Although falsity of the defamatory words is presumed, proof of the truth of the words by the defendant is a complete and absolute defense to a civil action for libel. *Pierce v. Cities Communications, Inc.*, 576 F.2d 495, 507, cert. denied, 439 U.S. 861 (1978); *Lowenschuss v. West Publishing Co.*, 542 F.2d 180, 184 (3d Cir. 1976); *Keddie v. Pennsylvania State University*, 412 F. Supp. 1264 (M.D. Pa. 1976); *Fram v. Yellow Cab Co. of Pittsburgh*, 380 F. Supp. 1314 (W.D. Pa. 1974); *Corabi*, supra at 449, 273 A.2d at 907; *Schonek v. WJAC, Inc.*, 436 Pa. 78, 84 258 A.2d 504, 507 (1969); *Schnabel v. Meredith*, 378 Pa. 609, 612, 107 A.2d 860, 862 (1954); *Montgomery v. Dennison*, supra at 264, 69 A.2d at 525; *Hartranft v. Hesser*, supra at 119; *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa. Super. 475, 485-86, 448 A.2d 6, 11 (1982); *Badami v. Dimson*, 226 Pa. Super. 75, 77, 310 A.2d 298, 300 (1973); Restatement (Second) of Torts §581A, comment b, at 235-36 (1976). Under our law, since truth is an absolute defense, whether the defamatory statements were made willfully or negligently, Restatement (First) of Torts §582 comment (a) (1938), a civil action in libel is only actionable, at least in theory, where the defamatory statement is also false.²

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defamation cases follows the general rule that "In civil proceedings, evidence of character is inadmissible unless directly in issue or involved in the nature of the proceedings, and even then evidence of good character is not admissible unless and until it is attacked by evidence to the contrary, it being presumed to be good in absence of proof that it is bad. 1 G. Henry, Pennsylvania Evidence §152 (1953) (emphasis added) citing *Costello v. Long*, 62 Pa. Super. 13, 17 (1915); *Burkhart v. North American Co.*, 214 Pa. 39, 42, 63 A.410, 411 (1906); *Clark v. North American Co.*, 203 Pa. 346 353, 53 A. 237, 239 (1902); *Chubb v. Gsell*, 34 Pa. 114, 116 (1859). See also 22 P.L.E. *Libel and Slander* §57 (1959).

2. In *Corabi* it is stated that falsity is not an element of the civil action of libel under our law. *Id.* at 449, 273 A.2d at 908. This statement is troubling. The fact that an element is presumed and can only be overcome by affirmative evidence establishing the contrary, does not remove it as an element of the cause of action. If such was

Rosenbloom, supra at 37; *Harbridge v. Greyhound Lines, Inc.*, 294 F. Supp. 1059 1063 (E.D. Pa. 1969); *Corabi*, supra at 448-49, 273 A.2d at 908; *Young v. Geiske*, 209 Pa. 515, 519, 58 A. 887, 888 (1904); *Wood v. Boyle*, supra at 631, 35 A. at 854; *Collins v. Dispatch Pub. Co.*, supra at 189-90, 25 A. at 547; *Barr v. Moore*, supra at 391; Restatement (First) of Torts §558 (1938). The cause of action arises not only because the words injure the reputation of another, but also because the publication is false. The defamatory nature of the comment, regardless of how injurious to the reputation, is not alone actionable. *Rosenbloom*, supra at 37; *Harbridge v. Greyhound Lines, Inc.*, supra at 1063; *Corabi*, supra at 448-49, 273 A.2d at 908; *Young v. Geiske*, supra at 519, 58 A. at 888; *Wood v. Boyle*, supra at 631, 35 A. at 853; *Collins v. Dispatch Pub. Co.*, supra at 189-90, 25 A. at 547; *Barr v. Moore*, supra at 391.

Even though false, published materials may not give rise to liability where it is privileged. The publisher of the defamatory falsehood under the traditional Pennsylvania law of defamation is not a guarantor of the truth of the materials published. However, privilege is abused if the defamatory statement is negligently published. In *Montgomery v. Philadelphia*, 392 Pa. 178, 140 A.2d 100 (1958), it was stated that the defense of privilege in cases of defamation "rests upon the . . . idea, that conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some

the case, there would be no need for the presumption in the first instance. See *Waugh v. Commonwealth*, 394 Pa. 166, 146 A.2d 297 (1959); *Waters v. New Amsterdam Casualty Co.*, 393 Pa. 247, 144 A.2d 354 (1958); *MacDonald v. Pennsylvania R. Co.*, 348 Pa. 558, 36 A.2d 492 (1944); *Smith v. Kingsley*, 331 Pa. 10, 200 A.11 (1938); *Watkins v. Prudential Ins. Co. of America*, 315 Pa. 497, 173 A. 644 (1934). A more accurate statement of our law is that, although falsity is an element of the cause of action, we have concluded that the burden should be placed upon the alleged defamer to establish the truth of these accusations and will presume it in the absence of proof to the contrary.

interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." 392 Pa. at 181, 140 A.2d at 102, quoting W. Prosser, *Torts* §607 (2d ed. 1955). Thus, truth was never the *only* defense to a civil libel action in Pennsylvania. This concept was clearly set out in *Diamond v. Krasnow*, 136 Pa. Super. 68, 7 A.2d 65 (1939), which stated that the immunity of a privileged communication "is an exception to the general rule that nothing short of the truth is a defense. . . ." *Id.* at 76, 7 A.2d at 69, citing *Stevenson v. Morris*, 288 Pa. 405, 136 A. 234 (1927); *Hartman v. Hyman*, 287 Pa. 78, 134 A. 486 (1926); *Montgomery v. New Era Printing Co.*, 229 Pa. 165, 78 A. 85 (1910); *Mulderig v. Wilkes-Barre Times*, *supra*; *McGaw v. Hamilton*, 184 Pa. 108, 39 A. 4 (1898); *Conroy v. Pittsburgh Times*, *supra*; *Russell v. Pa. Mut. Life Ins. Co.*, 118 Pa. Super. 351, 179 A.798 (1935); *McGerary v. Leader Publish. Co.*, 52 Pa. Super. 35 (1912); *Collins v. News Co.*, 6 Pa. Super. 330 (1898).

Nonetheless, tradition, evidentiary considerations, or any other state determined policy, cannot support the presumption of falsity, if it is offensive to constitutional mandate. Judge Sugerman reviewed the pertinent United States Supreme Court decisions and concluded that we are compelled to reject the rule that the defendant bears the burden of proving truth. We are unquestionably bound by the United States Supreme Court's interpretation of the provisions of the Federal Constitution. *First Pennsylvania Bank v. Lancaster County Tax Claim Bd.*, ___ Pa. ___, ___ 470 A.2d 938, 941 (1983); *Commonwealth v. Ware*, 446 Pa. 52, 56, 284 A.2d 700, 702 (1971), *cert. denied*, 406 U.S. 910 (1972); *Commonwealth ex rel. Banks v. Hendricks*, 430 Pa. 575, 578, 243 A.2d 438, 439 (1968); *Commonwealth v. Robin*, 421 Pa. 70, 72, 218 A.2d 546, 546 (1966); *Carolene Products Co. v. Harter*, 329 Pa. 49, 55, 197 A. 627, 630 (1938). We

will therefore review those decisions and assess Judge Sugerman's conclusions as to their impact under the facts of this case.

B.

At the outset of the discussion of the United States Supreme Court decisions, it must be remembered that the Court was attempting to define the extent of the freedom of expression provided under the First Amendment, and made applicable to the state through the Fourteenth Amendment, as it relates to civil actions for libel under state law. A subsidiary objective was the formulation of a rule that would satisfy the protection found to be constitutionally required. In the words of that Court, they were struggling "to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz*, *supra* at 325. Our purpose for reviewing these decisions at this time is to determine whether our rule of state libel law presuming the good reputation of the plaintiffs and setting up truth as a defense to be established by the defendant runs counter to the present interpretations of the First Amendment mandates.

In *New York Times*, *supra*, the Supreme Court stated that state law of civil libel "can claim no talismanic immunity from constitutional limitations". *Id.* at 267. That Court then proceeded to conclude that the central meaning of the First Amendment, enforced upon the states through the Fourteenth Amendment, required a privilege of fair comment and honest mistake of fact. The majority held that a public official is prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of

whether it was false or not".³ *Id.* at 279-80.

In the context of criticism of public officials the Court rejected the argument that the availability of the defense of truth, where the burden of establishing it is on the defendant, satisfies the constitutional concerns involved.

Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone". (citations omitted) The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

Id. at 279 (citations omitted).

Although *New York Times* made it clear that no longer would the former view that libel was speech not protected by the First Amendment be without exception, many questions were still left unanswered by that decision as to the full extent of the constitutional privilege developed therein. The *New York Times* decision did not expressly state that the constitutional protection required the shifting of the burden of proving falsity to the plaintiff in establishing a *prima facie* case. Nor did the reasoning of that decision necessarily implicitly compel such a result. See *Corabi, supra* at 468 n.22, 273 A.2d at 917 n.22. In *New York Times*, the Court had no occasion to consider the question of who should bear the burden of proving falsity when it is in fact in issue in the litiga-

3. The *New York Times* decision was without dissent. The three concurring justices would have required an absolute, unconditional privilege to critique official conduct. *New York Times v. Sullivan*, 376 U.S. 254, 297 (1964) (Black, J. concurring, joined by Douglas, J.); *Id.* at 304-05 (Goldberg, J., concurring, joined by Douglas, J.).

tion. To the contrary, the Court in *New York Times* was concerned with stressing "[t]hat erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive". *Id.* at 271-72.⁴

The major question commanding the attention of the Court in subsequent decisions was the extent to which the *New York Times* rule should apply. In 1967, the Court extended the *New York Times* rule to public figures in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 338 U.S. 130 (1967). In those cases the plaintiffs were not public officials as was the case in *New York Times*, but rather individuals who had attracted public attention either through the positions they held in society or their activities in affairs of public concern.⁵

4. We note that several of the decisions of that Court have stated the *New York Times* holding as requiring proof of falsity as part of the plaintiff's *prima facie* case. For instance in *Garrison v. Louisiana*, 379 U.S. 64 (1964), Justice Brennan stated:

We held in *New York Times* that a public official might be allowed the civil remedy *only if* he establishes that the utterance was false. . . .

Id. at 74. (emphasis added)

See also *Greenbelt Corp. Publishing Assn. v. Bresler*, 398 U.S. 6, 8 (1970); *Rosenblatt v. Baer*, 389 U.S. 75, 84 (1966).

However, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), Justice White speaking for the Court again stated that "the prevailing view is that truth is a defense". *Id.* at 489. Thus as to whether the communications intended to be covered by the *Times* rule, required proof of falsity as part of the plaintiff's *prima facie* case under the *New York Times* decision is at best unclear and debatable. Moreover, the subsequent restatement of the *Times* holding in the cited cases can arguably be classified as loose characterizations and thus not determinative of the question as to where the burden of proving falsity, should lie. See *Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond*, 61 Va. L. Rev. 1349, 1383-84 (1975).

5. At this stage of the development of the term a "public figure" is one who through fame, notoriety of achievements, or through voluntary participation in resolution of important public questions, seeks to influence society. *Time, Inc. v. Firestone*, 424 U.S. 448, 453

However, in *Rosenbloom, supra*, the Court was divided on whether the standard of knowing or reckless falsity applied where the alleged defamatory statements related to a private individual in a matter of public or general concern.⁶

Instant appellee concedes that up to this point the constitutional protection identified in *New York Times* had not been extended to the private citizen seeking redress for an alleged libel under state law. Thus the state could, without reference to the Constitution, assign the burden to prove truth upon the defendant in a private figure libel case. Brief of Appellees at 13. We agree with this concession and add, as previously noted, even if the constitutional protection had been found applicable, it was still unclear up to that point whether placing the burden of proving truth upon the defendant would have

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(1976); *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 337, 342 (1974); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 154, 164 (1967); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273 (3d Cir. 1980). The characteristics of this category deemed to justify the application of the actual malice standard are that the public figure invites public attention, criticism and comment and usually has access to the media to refute any defamatory publicity. *Time, Inc., supra* at 456; *Gertz, supra* at 344; *Steaks Unlimited, supra* at 274.

6. To be distinguished from those included within the "public figure" category is the involuntary public figure. This is an individual who has not attained fame or notoriety and who is thrust into an event of general public interests involuntarily. *Times, Inc. v. Firestone*, 424 U.S. 448 (1976). Justice Brennan in *Rosenbloom v. Metromedia, Inc.* 403 U.S. 29 (1971) argued that the "malice standard" should not focus on the nature of the individual involved but rather upon whether the event is one of general public interests. See also *Gertz, supra* at 361 (Brennan, J., dissenting). The *Firestone* Court specifically rejected the Brennan view stating that such an extension would unjustifiably abridge a legitimate state interest in protecting private individuals from libelous publications. *Id.* at 454. Our decision in *Matus v. Triangle Publications, Inc.*, 445 Pa. 384, 286 A.2d 357 (1971), cert. denied, 409 U.S. 856 (1972), which adopted the position of the *Rosenbloom* plurality, must therefore be overruled.

been offensive to such a Constitutional mandate. Nevertheless, appellee relies, as did Judge Sugerman, upon the Court decision in *Gertz* as the basis for the view that the First Amendment is here applicable and that placing the burden upon the defendant to prove truth runs afoul of the protection afforded free expression.

C.

In approaching the issue in *Gertz* that the Court was unable to resolve in *Rosenbloom*, they began by recognizing that the difference between the public official and public figure on the one side and the private individual on the other warranted a different approach in the two situations. The Court expressed the belief that "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."⁷ *Gertz, supra* at 345. After acknowledging the persisting antithesis that must necessarily exist between freedom of speech and press and libel actions,⁸ the Court nevertheless concluded that "the states should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual."⁹ Acknowledg-

7. The United States Supreme Court has interpreted the First Amendment as affording private individuals a greater protection from defamation than both public officials and public figures because public figures and officials enjoy a greater opportunity to reply to libelous statements and they have also purposefully assumed a position in society which invites attention and comment. By voluntarily assuming such a role in society, public figures and officials relinquish, to a degree, their right to privacy. *Gertz, supra* at 345.

8. The Court noted that since libel is based upon the content of the speech, it limits the freedom of the publisher to express certain sentiments unless the publisher is willing to take the risk of the defense of a civil action in libel. *Gertz, supra* at 342.

9. In this context, the Court noted that the extension of the *New York Times* test proposed by the *Rosenbloom* plurality would "abridge this state interest [protecting private citizens from injury resulting from defamatory falsehood] to a degree that we find un-

ing the legitimacy of the concern of the *New York Times* Court to assure the freedoms of speech and press that "breathing space" essential to their fruitful exercise, see *NAACP v. Button*, 371 U.S. 415 (1963), the *Gertz* Court held that "the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to the private individual" provided the state did not create a scheme that imposed liability without fault. *Gertz*, *supra* at 347.¹⁰

In reaching this conclusion, the *Gertz* Court stated that it believed its rule would insulate the private citizen from the stringent standard of actual malice, and yet shield the media from the rigors of strict liability.¹¹ The Court stated that it had chosen this approach "in recog-

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acceptable". *Gertz*, *supra* at 346.

10. The *Gertz* Court characterized a rule of strict liability as one which compels a publisher or broadcaster to guarantee the accuracy of his factual assertions. *Gertz*, *supra* at 340. The Court stated that "[a]llowing the media to avoid liability *only* by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties." *Id.* (emphasis added).

11. As a caveat to this aspect of the *Gertz* standard, the Court cautioned:

... At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substantial danger to reputation apparent." This phrase places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Cf. *Time, Inc. v. Hill*, 385 US 374 (1967). Such a case is not now before us, and we intimate no view as to its proper resolution.

Id. at 348 (emphasis added; footnote omitted).

Since, however, the defamatory character of the articles in question in this appeal was apparent, the above caveat of *Gertz* is not here applicable.

nition of the strong and legitimate state interest in compensating private individuals for injury to reputation." *Id.* at 348.

However, the Court found that this compelling state interest did not extend beyond compensation for actual injury.

[W]e hold that the states may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

Id. at 349.

The Court was of the view that the "largely uncontrolled discretion" conferred on juries in presumed damages and the invitation in these instances to juries "to punish unpopular opinion" did offend constitutionally protected free expression. Concluding that presumed damages constituted "gratuitous awards of money damages far in excess of any actual injury," *id.* at 349, the Court reasoned that the state interest in these instances was insufficient to permit recovery unless, at a minimum, at least, the *New York Times* standard is met. Following the same general reasoning as employed in the case of presumed damages, the Court reached the same result for punitive damages.

II. A.

It is apparent from *Gertz* and the cases following it, *Herbert v. Lando*, *supra*; *Time, Inc. v. Firestone*, *supra*; that the only restraint upon the states mandated by the First Amendment in civil actions for defamatory falsehood brought by a private figure for compensatory damages is that they may not impose liability upon the defendant without fault. As early as 1939 this Court stated, in *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A.2d 302 (1939), that liability for defamatory

falsehood cannot be imposed without fault. The defendant in that case was a broadcasting company that rented its time and facilities to an advertising corporation for the transmission of a series of sponsored radio programs over one of its networks. A script for each program was prepared in advance and submitted to the broadcaster and followed exactly by the performers at rehearsals where it was approved. All participants in the program in question were employed and paid by the advertising company which had rented the time slot. When the program was over one-half completed, one of the participants interpolated an extemporaneous remark.

The trial court found that the interjected "ad lib" was "slanderous per se" and ruled that the defendant's liability was absolute though it was without any fault. In rejecting the trial court's acceptance of a theory of strict liability, Chief Justice Kephart noted:

In Pennsylvania, the principle of liability without fault for injuries to the person has received scant consideration. The great body of our law of liability for personal injuries is that of liability through fault; liability based almost exclusively on wrongful conduct.

Id. at 187, 8 A.2d at 304.

In discussing other areas where some states had imposed strict liability, reference was made to those jurisdictions that were then extending a theory of strict liability to publishers of newspapers for defamatory publications, the Court stated:

Considering the rule of supposedly absolute liability imposed in some jurisdictions on the publisher of a newspaper for his defamatory publications, and this is the rule here chiefly relied on, a close examination of the Pennsylvania law will show that our rule is not

one of absolute liability, but rather, of a very strict standard of care to ascertain the truth of the published matter. (Citations and footnote omitted)

Id. at 192, 8 A.2d at 307.

Thus, it would appear that long before the First Amendment considerations were raised, the common law of this jurisdiction had determined that the law of libel should require negligence or willful misconduct. See *Rosenbloom v. Metromedia, Inc.*, *supra* at 87 n.13; *Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404, 410 N.3 (E.D. Pa. 1983); *Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167, 178-81, 191 A.2d 662, 668-69 (1963); *Williams v. Kroger Grocery & Baking Co.*, 337 Pa. 17, 19, 10 A.2d 8, 9 (1940); *Wharen v. Dershuck*, 264 Pa. 562, 566, 108 A.18, 19-20 (1919); *Clark v. North American Co.*, 203 Pa. 346, 352, 53 A. 237, 239 (1902); *Neeb v. Hope*, 111 Pa. 145, 151-52, 2 A. 568, 570-71 (1885).¹²

We are mindful that the former conditional privileges recognized under our law have lost their significance in the wake of *New York Times* and *Gertz*. If a private figure plaintiff is to maintain any cause of action at all, he must minimally establish the negligence on the part of the publisher. In so doing, "he has by that very action proved any possible conditional privilege was abused." Restatement (Second) of Torts, Topic 3, Title A, Special Note, at 259 (1977); see also *Nevada Independent Broadcasting Corp. v. Allen*, ___ Nev. ___, 664 P.2d 337, 342-343 (1983).

12. Moreover, the requirement of fault has been codified in Pennsylvania law since 1901. 42 Pa. C.S. §8344 (originally enacted in Act of April 11, 1901, P.L. 74 §3, 12 P.S. §1583) provides:

Malice or negligence necessary to support award of damages

In all civil actions for libel, no damages shall be recovered unless it is established to the satisfaction of the jury, under the direction of the court as in other cases, that the publication has been maliciously or negligently made, but where malice or negligence appears such damages may be awarded as the jury shall deem proper.

B.

The core of the reasoning of both the trial court and instant appellees is that the *Gertz* prohibition against strict liability necessarily requires that the plaintiff must have the burden of proving the falsity of the matter. This proposition does not logically flow, nor is it consistent with the concern sought to be addressed by the *Gertz* rule. The concept of fault as developed in the *Gertz* decision is not synonymous with the burden of proof of truth or falsity. The *Gertz* Court wished to avoid the possibility that a publisher may be held liable for defamation even though he took every conceivable precaution to ensure the accuracy of the offending statement prior to its dissemination. *Id.* at 346. Under the law of this Commonwealth there is no liability for civil libel unless plaintiff can at least establish that the dissemination occurred as a result of lack of due care. 42 Pa. C.S. §8344; *Rosenbloom, supra* at 87 n.13; *Zerpol Corp. v. DMP Corp., supra* at 410 n.3; *Purcell v. Westinghouse Broadcasting Co., supra* at 178-81, 191 A.2d at 668-69; *Williams v. Kroger Grocery & Baking Co., supra* at 19, 10 A.2d at 9; *Wharen v. Dershuck, supra* at 566, 108 A. at 19-20; *Clark v. North American Co., supra* at 352, 53 A. at 239. A plaintiff, even though benefitting from the presumption of falsity, must nevertheless show that defendant acted maliciously or negligently. 42 Pa. C.S. §8344; *Rosenbloom, supra* at 87 n.13; *Zerpol Corp. v. DMP Corp., supra* at 410 n.3; *Purcell v. Westinghouse Broadcasting Corp., supra* at 178-81, 191 A.2d at 668-69; *Williams v. Kroger Grocery & Baking Co., supra* at 19, 10 A.2d at 9; *Wharen v. Dershuck, supra* at 556, 108 A. at 19-20; *Clark v. North American Co., supra* at 352, 53 A. at 239. Restated, under our law the inability of the publisher to overcome the presumption of falsity of the defamatory statement will not insure recovery by the plaintiff. The recovery is dependent upon plaintiff's ability to establish malice or negligence on the part of the

publisher in disseminating the defamatory falsehood.¹³ See 42 Pa. C.S. §8343(a)(7); *Corabi, supra* at 452 N.10, 453, 273 A.2d at 899, n.10; *Sciandra v. Lynett, supra* at 601, 187 A.2d at 589; *McAndrew v. Scranton Republican Pub. Co., supra* at 515, 72 A.2d at 785; *Montgomery v. Dennison, supra* at 262-64, 69 A.2d at 524-25.

We are satisfied that Pennsylvania law makes a constitutionally acceptable accommodation between the freedom of expression required by the First Amendment and our law of civil libel for compensatory damages brought by a private individual to redress defamatory falsehood. Strict liability is a policy determination that injury flowing from a set of circumstances will be compensable regardless of the blamelessness of the conduct of the defendant. The prohibition of *Gertz* restrains a state from attempting to protect its private citizens

13. In a rather circuitous argument, appellees contend that falsity is inextricably bound up with proof of fault. Appellees assert that to prove fault the plaintiff in fact must demonstrate the falsity of the matter. While in some instances the plaintiff may elect to establish the patent error in the material to demonstrate the lack of due care in ascertaining its truth, it does not necessarily follow that negligence of the defendant can only be shown by proving that the material is false. A plaintiff can demonstrate negligence in the manner in which the material was gathered, regardless of its truth or falsity. In such instance the presumption of falsity will prevail unless the defendant elects to establish the truth of the material and thereby insulate itself from liability. Where it is necessary to prove falsity to establish the negligence of the defendant, it is then the burden of the plaintiff to do so. The would appear to be a situation contemplated by former Chief Justice Roberts in his concurring opinion in *Moyer v. Phillips*, 462 Pa. 395, 404, 341 A.2d 441, 445 (1975) (Roberts, J., concurring, joined by Nix, J.). There it is suggested that "as a practical matter, the plaintiff will find it necessary to prove the falsity of the statement in order to establish the necessary element of fault; to this extent, the defendant is relieved of the burden of proving truth as a defense. *Id.* at 407-08, 341 A.2d at 447. That proposition will not, of course, hold true in all cases. Where negligence can be established without a demonstration of the falsity of the material, there is no additional obligation upon the plaintiff to prove the falsity of the material.

from defamatory falsehood causing injury to reputation by allowing compensatory damages without predicating the recovery on a showing of some wrongdoing on the part of the publisher. To assess the liability solely on the basis that the published defamatory utterance was erroneous would offend the "breathing space" that free debate requires. As we understand the thrust of the *Gertz* reasoning, it would not offend the principles articulated therein to place the burden of proving truth upon a defendant as long as the recovery is dependent upon the plaintiff's ability to establish the defendant's willful or negligent conduct in publishing the defamatory matter.

Our conclusion is bolstered by the fact that the *Gertz* holding adopted the view of the dissenters in *Rosenbloom*, *supra* at 64 (Harlan, J., dissenting); *id.* at 86-87 (Marshall, J., dissenting, joined by Stewart, J.), that the States are free to develop their own standards of liability for media defendants so long as they do not impose liability without fault. See *Gertz*, *supra* at 339, 347. In *Rosenbloom*, Pennsylvania libel law was under scrutiny and the dissenters were satisfied that their standard had not been violated. Although it was clear that the *Rosenbloom* Court was aware of the Pennsylvania requirement placing the burden of proving truth upon the defendant, nonetheless, neither dissenting opinion equated that allocation with strict liability. In fact, Justice Marshall plainly stated that Pennsylvania, unlike many other jurisdictions, did *not* apply a liability-without-fault standard. *Id.* at 87 n.13 (Marshall, J. dissenting). Moreover, the plurality which would have required the actual malice standard at no point suggested that Pennsylvania law attempted to impose liability without fault.

What the appellee is in essence arguing is that, even though the media publishes or reports maliciously or negligently a defamatory statement injurious to the reputation of a private citizen, it should be insulated from liability unless the plaintiff can affirmatively demon-

strate the falsity of the statement. We find nothing in the Supreme Court decisions that would suggest such a result. The "breathing space" requirement of the First Amendment has not been extended, nor do we believe it can be reasonably extended, to condone or to encourage irresponsible conduct by the media in its exercise of informing the public of newsworthy events. Nor can we conceive of a legitimate constitutionally protected interest in condoning the media's malicious or negligent discharge of this responsibility. Free debate will not be encouraged by allowing it to become the forum for malicious or negligent abuse of the reputation of those involved in the controversy. The right to criticize must carry some degree of responsibility, particularly where it may jeopardize the reputation of a private citizen.

We note further that a media defendant in a civil libel action is given even greater protection under our statutory law. In addition to the privilege to communicate matters of public interest and concern without fear of liability for erroneous information disseminated without negligence or malice, a newspaper publisher is privileged to withhold the identity of sources of information. The Pennsylvania Shield Law, 42 Pa. C.S. §5942(a), provides that:

(a) General rule.—*No person* engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, *shall be required to disclose the source* of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

This statute has been interpreted broadly. See, e.g., *Lal v. CBS, Inc.*, 726 F.2d 97, 100 (3d Cir. 1984); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 278 (3d Cir.

1980); *In Re Taylor*, 412 Pa. 32, 40, 193 A.2d 181, 185 (1963). There, sources are excludable whether or not they contain the identity of sources actually used by the newspaper since the identity of all persons named or implicated in these sources is also included within the protection of the "shield law". *Lal v. CBS, Inc.*, *supra* at 100; *Steaks v. Deaner*, *supra* at 278; *In Re Taylor*, *supra* at 40, 193 A.2d at 185.¹⁴

As a consequence of this greater protection to the media defendant provided by the "shield law", the plaintiff in a civil libel action is restricted in his ability to prove the falsity of the defamatory statement. He is denied access to the sources of information on which the statement is based. The defendant, who does possess that information is therefore in a better position to prove the truth of the defamatory statement. Thus this additional protection to a media defendant and the resulting impediment imposed upon the plaintiff in seeking to establish the falsity of the statements provides a further justification for maintaining our current practice of requiring the defendant to prove truth in defense of such a suit.

C.

For the foregoing reasons we hold that in a libel suit brought by a private individual for compensatory damages resulting from the defamatory material, the presumption of falsity remains and the defendant has the option of proving truth as an absolute defense to the action. The trial court's instruction to the contrary was error and the resulting verdict cannot be allowed to stand. Since the verdict was a general one we are unable to ascertain whether the jury found for the defendants because of its conclusion that the plaintiff had failed to es-

14. It must be noted that the shield law is designed to protect the confidentiality of the source; it was never intended to be interpreted as insulating the publisher from its negligence or actual malice.

tablish the falsity of the defamatory statements or whether the verdict reflects a finding that defendant was not negligent in publishing the material. The latter reason, of course, would have been a proper basis for the verdict, but the former reason is not in accordance with our law. Accordingly, the judgment of the trial court is reversed and a new trial is awarded as to the claim for compensatory damages.

III.

Since we are remanding the cause for a new trial on compensatory damages, it is also necessary to review appellant's assertion that the trial court erred in withdrawing from the jury's consideration the punitive damage issue. The trial court ruled that the appellant had presented insufficient evidence of the reporter's "actual malice" at trial so as to raise a triable issue of fact. We agree.

We should note that the *Gertz* decision has raised considerable controversy concerning whether it foreshadows the total abolition of punitive damage awards in defamation cases.¹⁵ In holding unconstitutional the awarding of presumed or punitive damages where defamatory publications are negligently published, the *Gertz* Court reasoned that the potential for large jury verdicts, completely unrelated to the actual injury suffered by the victim, might have a chilling effect or act as a prior

15. Some commentators believe that *Gertz* indicates the United States Supreme Court will ultimately abolish punitive damage in defamation cases. See, e.g., Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex. L. Rev. 199, 215 (1976); Comment, 28 Vand. L. Rev. 887, 8897 (1975).

Other commentators have concluded that *Gertz* did not in itself abolish punitive damages but merely limited their availability. See, e.g., Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 Rut.-Cam. L. J. 471, 507 (1975); Comment, 6 Loyola University Law J. 256, 267 (1975).

restraint of free expression. *Gertz*, *supra* at 350-51. Further, the Court surmised that the doctrine of presumed damages and the unabridged discretion conferred upon juries to award punitive damages, bearing no relationship to the injury suffered, invites juries to punish the expression of unpopular opinion rather than effectuate any legitimate social goal. *Id.* at 350-51. Nonetheless, a number of courts have considered whether *Gertz* pre-saged the abolition of punitive damages and have concluded that it did not.¹⁶ We are satisfied that under the present law as articulated by the United States Supreme Court there has not been a sufficiently definitive directive to cause us to abandon the long standing practice in this jurisdiction of allowing punitive damages in the appropriate case.

The *Gertz* decision did make it clear that the negligent standard of fault would not be a sufficient basis for the allowance of punitive damages. To justify punitive damages, the plaintiff is called upon to satisfy the "actual malice" test. *Gertz v. Robert Welch, Inc.*, *supra* at 350; *Levine v. CMP Publications, Inc.*, 738 F.2d 660, 674 (5th Cir. 1984); *Braun v. Flynt*, 726 F.2d 245, 256 (5th Cir.), *cert. denied*, —, U.S. —, 105 S. Ct. 252 (1984); *Hunt v. Liberty Lobby*, 720 F.2d 631, 650 (11th Cir. 1983); *Golden Bear Distributing Systems of Texas, Inc.*, 708 F.2d 944, 947 (5th Cir. 1983); *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 479 (9th Cir. 1977); *Appleyard v.*

16. *Hunt v. Liberty Lobby*, 720 F.2d 631 (11th Cir. 1983); *Maheu v. Hughes Tool Co.*, 569 F.2d 459 (9th Cir. 1977); *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976); *Appleyard v. Transamerican Press, Inc.*, 539 F.2d 1026 (4th Cir. 1976); *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976); *Davis v. Schuchat*, 510 F.2d 731 (D.C. Cir., 1975); *Selby v. Savard*, 137 Ariz. 222, 655 P.2d 342 (1982); *Roemer v. Retail Credit Co.*, 44 Cal. App. 3d 926, 932, 119 Cal. Rptr. 82, 85 (1975); *Fopay v. Noveroski*, 31 Ill. App. 3d 182, 198, 334 N.E. 2d 79, 92 (1975); *Embrey v. Holly*, — Md. —, 442 A.2d 966 (1982); *Newspaper Publishing Corp. v. Burke*, 216 Va. 800, 224 S.E.2d 132, 136 (1976); *Calero v. Del Chemical Corp.*, 68 Wis. 2d 737, 228 N.W.2d 737, 747 (1975).

Transamerican Press, Inc., 539 F.2d 1026, 1030 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Buckley v. Littell*, 539 F.2d 882, 897 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Carson v. Allied News Co.*, 529 F.2d 206, 214 (7th Cir. 1976); *Davis v. Schuchat*, 166 U.S.App. D.C. 351, 357 510 F.2d 731, 737 (1975). We therefore turn to the question as to whether, upon this record, the trial court was correct in concluding that the evidence was insufficient to establish "actual malice". After a thorough review of the record, we are satisfied that the trial court's decision in this regard was correct.

In assessing the propriety of the trial court's withdrawal of the issue from the jury, we are mindful that such a ruling should be entered only in a clear case. *Hef-ferman v. Rosser*, 419 Pa. 550, 215 A.2d 655 (1966); *Howard Express Co. v. Wile*, 64 Pa. 201 (1870). The publisher's hatred, spite, hostility or deliberate intention to harm the plaintiff is not sufficiently probative of his knowledge of falsity or awareness of probable falsity so as to allow its admissibility where "actual malice" is at issue, but once established, the elements heretofore enumerated would be admissible. *Cf. Greenbelt Coop. Publishing Ass'n. v. Bressler*, *supra* at 10-11. As has been suggested, such testimony would invite a jury to improperly find a defendant liable where he acted with a guilty heart rather than a guilty mind. Also, it is axiomatic that a publisher's failure to investigate in itself is insufficient to establish "actual malice", *St. Amant v. Thompson*, *supra* at 732-33; *New York Times Co. v. Sullivan*, *supra* at 287-88; *Hunt v. Liberty Lobby*, *supra* at 643; *Brewer v. Memphis Publishing Co., Inc.*, 626 F.2d 1238, 1258 n.26 (5th Cir., 1975); *New York Times v. Conner*, 355 F.2d 567, 577 (5th Cir. 1966). So too, errors of judgment or interpretation as opposed to errors of historical fact have been held to be insufficient to create a jury issue of "actual malice". *Time v. Pape*, 401 U.S. 279, 290 (1971).

"Actual malice" can be established either by proving the publication was made with the knowledge of the fal-

sity of its content or with reckless disregard of whether it was false or not. *Rosenblatt v. Baer*, 384 U.S. 75, 84 (1966); *New York Times Co. v. Sullivan*, *supra*. When the first alternative is relied upon, the plaintiff must show not only the falsity of the statement but, in addition, it is the plaintiff's responsibility to establish the defendant's knowledge of that falsity at the time of publication.

In this context it must be noted that the presumption of falsity available to the plaintiff where the negligent standard is applicable is of no assistance in meeting the burden of proving "actual malice" under this theory. The Supreme Court has made it clear that a presumption may not be used to satisfy the fault element of the cause of action. It is also to be noted that under our traditional law such an approach would not be allowed. We have long recognized the evidentiary principle that a presumption may not be built upon a presumption. *Collins v. Hand*, 431 Pa. 378, 246 A.2d 398 (1968); *Auerbach v. Philadelphia Transportation Co.*, 421 Pa. 594, 221 A.2d 163 (1966); *Neely v. The Provident Life and Accident Insurance Co.*, 322 Pa. 417, 185 A. 784 (1936); *Philadelphia City Passenger Railway Co. v. Henrice*, 92 Pa. 431 (1880); *Douglas v. Mitchell's Executor*, 35 Pa. 440 (1860). In this instance it would require presuming not only that the content was false, but also that the defendant at the time of publication knew of that falsity. This is the clearest type of double presumption that we have rejected. Cf. *Collins v. Hand*, *supra*; *Auerbach v. Philadelphia Transportation Co.*, *supra*.

In the instant matter there was no basis for the jury to have concluded that the publication was made with the knowledge of the falsity of its content. While the plaintiff attempted to show that the dissemination was made with reckless disregard of the truth of its content, it is equally apparent that a jury issue was not created under the clear and convincing test required for such an award of damages. *Bose Corp. v. Consumers Union of*

U.S., Inc., *supra* at ____n.30, 85 L. Ed.2d at 526 n.30; *Gertz v. Robert Welch, Inc.*, *supra* at 342; *St. Amant v. Thompson*, *supra* 731; *Garrison v. Louisiana*, *supra* at 74; *New York Times v. Sullivan*, *supra* at 280; *Levine v. CMP Publications, Inc.*, *supra* at 674; *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 538 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983); W. Prosser, *Torts* 771-772, 821 (4th ed. 1971). Thus the trial court properly withdrew that question from the jury's consideration. *Heferman v. Rosser*, 419 Pa. 550, 215 A.2d 655 (1966); *Thomas v. Tomay*, 413 Pa. 270, 196 A.2d 740 (1964); *Greet v. Arned Corp.*, 412 Pa. 292, 194 A.2d 343 (1963); *Luterman v. Philadelphia*, 396 Pa. 301, 152 A.2d 464 (1959); *Miller v. Montgomery*, 397 Pa. 94, 152 A.2d 757 (1959); *Hepler v. Hammond*, 363 Pa. 355, 69 A.2d 95 (1949).

IV.

Accordingly, the order of the trial court is reversed and a new trial is awarded. The new trial will be confined to a determination of defendant's liability and the assessment of compensatory damages if the liability issue is decided in favor of the plaintiff.

Mr. Justices Larsen and McDermott did not participate in the consideration and decision of this case.

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APPENDIX 2

MAURICE S. HEPPS, et al.	:	In the Court of
	:	Common Pleas
	:	Chester County,
	:	Pennsylvania
- vs -	:	
	:	
PHILADELPHIA NEWS-	:	No. 36 May Term, 1976
PAPERS, INC.	:	
WILLIAM ECENBARGER	:	
and WILLIAM LAMBERT	:	Civil Action — Law

OPINION

By SUGERMAN, J.

The instant "private figure" libel action was commenced by the Plaintiffs against Philadelphia Newspapers, Inc., the publisher of the Philadelphia Inquirer ("Inquirer"), and two of its reporters, William Ecenbarger and William Lambert. We need not recite the facts underlying the action as they are set forth at length in *Hepps v. Philadelphia Newspapers, Inc.*, 3 D. & C. 3d 693 (Ches. Co. 1977), an Opinion filed by the writer in response to a pre-trial Motion for discovery.

Suffice it to note that in a series of five "investigative" articles, published by the Inquirer, the Defendant-reporters linked the individual and corporate Plaintiffs to certain named "underworld" figures and to organized crime generally.

The case was tried to a jury for a period of nearly six weeks and on July 13, 1981, the jury returned a general verdict in favor of all defendants. The Plaintiffs filed a timely Motion for a new trial, and following argument thereon, we denied the same. The Plaintiffs thereupon

appealed to the Supreme Court of Pennsylvania¹, and we write pursuant to the mandate of Pa. R.A.P. 1925(b).

Upon our receiving notice of the Plaintiffs' appeal, we directed them to serve upon us a Statement of matters complained of on appeal ("Statement"): Pa. R.A.P. 1925(a). The Plaintiffs have served such Statement upon us, setting forth four issues, all essentially relating to the Court's final instructions to the jury. We address the issues in turn.

1

The elements of a cause of action for defamation and the respective burdens of proof have for some years been codified in Pennsylvania and are presently found in the Judicial Code² at 42 Pa. C.S.A. §8343. The latter section provides the following:

"§8343. Burden of proof

(a) Burden of plaintiff. — In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

(1) The defamatory character of the communication.

(2) Its publication by the defendant.

(3) Its application to the plaintiff.

(4) The understanding by the recipient of its defamatory meaning.

1. As will be seen *infra*, we declared a statute of Pennsylvania unconstitutional. Accordingly, the Supreme Court of Pennsylvania is vested with exclusive jurisdiction of such appeals. 42 Pa. C.S.A. §722(7).

2. Act of 1976, July 9, P.L. 586, No. 142, §2, effective June 27, 1978. The Judicial Code was of course in effect at the time of the instant trial.

(5) The understanding by the recipient of it as intended to be applied to the plaintiff.

(6) Special harm resulting to the plaintiff from its publication.

(7) Abuse of a conditionally privileged occasion.

(b) *Burden of defendant.* — In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

(1) The truth of the defamatory communication.

(2) The privileged character of the occasion on which it was published.

(3) The character of the subject matter of defamatory comment as of public concern." (Emphasis added).

Prior to instructing the jury, at the conclusion of the trial, we declared 42 Pa. C.S.A. §8343(b)(1) which places the burden of proving the truth of a defamatory publication upon the defendant, to be unconstitutional as in violation of the First Amendment to the Constitution of the United States. More specifically, we ruled that in a libel action brought by a "private figure"³ against a media defendant, as at bar, the First Amendment requires that the *plaintiff* bear the burden of proving the *falsity* of the defamatory publication, and we so instructed the jury (N.T. 3848). Thus, we added an element to the Plaintiffs' cause of action: proof of the falsity of the publication. Our ruling was based upon our interpretation of *Gertz v. Robert Welch, Inc.*, *supra*, and de-

3. See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) (hereinafter, "*Gertz*"), *Avins v. White*, 627 F. 2d 637 (3d Cir. 1980).

cisions of two United States Circuit Courts of Appeal, discussed *infra*.

The Plaintiffs contend on appeal that our ruling was erroneous and base this contention upon three grounds: (a) the Supreme Court of Pennsylvania, in *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A. 2d 899 (1971) (hereinafter, "*Corabi*"), citing *Restatement of Torts* §613 (1938), specifically held that the burden of proving the truth of a communication is upon a libel defendant, and this Court, as a court of inferior jurisdiction, is bound by the holding in *Corabi*; (b) quite apart from *Corabi*, 42 Pa. C.S.A. §8343(b)(1) is constitutional; and (c) regardless of whether the latter section of the Judicial Code is constitutional, the Defendants have waived the right to challenge the constitutionality of the statute by failing to follow the notice requirements of Pa. R.C.P. No. 235. We examine each of these grounds briefly.

(a)

As observed, the Plaintiffs contend that the issue is controlled by the decision of the Supreme Court of Pennsylvania in *Corabi*, and that as the issue before us is the same as that confronted by the Court in *Corabi*, and as we are a court of inferior jurisdiction, we are bound to follow *Corabi*. Certainly we are aware that a majority opinion of the Supreme Court of Pennsylvania is binding precedent upon the courts of Pennsylvania. *Commonwealth v. Mason*, 456 Pa. 602, 322 A. 2d 357, 358 (1974), and we are not free to overrule the decisional law enunciated by that Court, *Hillbrook Apartments, Inc. v. Nyce Crete Co.*, 237 Pa. Super. 565, 573, 352 A. 2d 148, 152 (1975). And see, 10 P.L.E. Courts §81.

The Plaintiffs at the same time concede, as they must, that all Pennsylvania Courts, including of course the courts of common pleas, are bound to follow the decisions of the Supreme Court of the United States on all questions involving the construction and interpretation

of the Constitution of the United States. *Commonwealth v. Ware*, 446 Pa. 52, 284 A. 2d 700 (1971), cert. den. 406 U.S. 910, 92 S. Ct. 1606, 31 L. Ed. 2d 821 (1972); *Commonwealth ex rel. Banks v. Hendrick*, 430 Pa. 575, 243 A. 2d 438 (1968)⁴. With these principles in mind, it is appropriate to briefly examine *Corabi* in order to determine the nature of the issue it *did* decide.

In *Corabi*, the plaintiff, a public figure, instituted a libel action against Curtis Publishing Company, seeking damages for the publication of an article in the Saturday Evening Post alleged to be defamatory. A jury returned a verdict in favor of the plaintiff and the defendant, Curtis, thereupon filed a motion for judgment notwithstanding the verdict, on the ground, *inter alia*, that the plaintiff failed to show by clear and convincing evidence the falsity of the article in question. The lower court denied the motion and the defendant appealed, essentially asserting before the Supreme Court that permitting a public figure libel plaintiff to recover against a media defendant without a clear and convincing showing of the falsity of the publication in suit would violate the

4. Speaking to the question of the force of decisions of the United States Court of Appeals for the Third Circuit, interpreting the Constitution of the United States, our Supreme Court has said:

"When the United States Court of Appeals for the Third Circuit has held certain practices or procedures to violate federal constitutional rights, its decision will be accepted and followed by the courts of this Commonwealth until the United States Supreme Court has spoken on the issue. *Commonwealth v. Negri*, 419 Pa. 117, 213 A. 2d 670 (1965). See also *Commonwealth v. Bennett*, 445 Pa. 8, 282 A. 2d 276 (1971)."

Schreiber v. Republic Intermodal Corp., 473 Pa. 614, 620 n. 5, 375 A. 2d 1285, 1288 n. 5 (1977). And see, *Commonwealth v. Whitner*, 241 Pa. Super. 316, 322 n. 9, 361 A. 2d 414, 417 n. 9 (1976):

"On questions of constitutional proportions, considerations of comity require that decisions of the Third Circuit be treated as binding authority, unless and until the United States Supreme Court speaks to the contrary. [Citations omitted]."

defendant's "rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States". *Id.* at 439, 273 A. 2d at 903.

The Court squarely addressed the issue and held, adversely to the defendant,

"... counsel for Curtis claimed that, should the constitutional privilege [under the First and Fourteenth Amendments to the Constitution of the United States] be applicable, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964), and its progeny placed the burden on plaintiff to prove falsity rather than requiring defendant to prove truth. We do not agree, but such a contention does warrant that we re-examine the bases of some aspects of our law of libel in Pennsylvania in the light of the constitutional limitations placed thereon.

'It is fundamental in Anglo-Saxon jurisprudence that any man accused of wrong-doing is presumed innocent until proven guilty. This is the rule not only in our criminal courts but in the ordinary affairs of life:' *Montgomery v. Dennison*, 363 Pa. 255, n. 2, at 263, 69 A. 2d 520 (1949). Because of this fundamental premise, 'in actions for defamation, the general character or reputation of the plaintiff is presumed to be good:' 53 C.J.S. Libel and Slander §210, at 317 (1948); accord, *Klumph v. Dunn*, 66 Pa. 141 (1871); *Chubb v. Gsell*, 34 Pa. 114 (1859).

As one consequence, as a general rule the falsity of defamatory words is presumed: 53 C.J.S. Libel and Slander §217 (1948). See *Hartranft v. Hesser*, 34 Pa. 117 (1859). Nevertheless, although ordinarily in order to be actionable words must be false, falsity is not an element of a cause of action for libel in Pennsylvania. Rather the opposite of falsity, truth, is a complete and absolute defense to a civil action for libel: *Schnabel v. Meredith*, supra; *Kilian v.*

Doubleday & Co., Inc., 367 Pa. 117, 79 A. 2d 657 (1951); Restatement of Torts §582 (1938). See also, *Matson v. Margiotti*, 371 Pa. 188, 88 A. 2d 892 (1952); *Montgomery v. Dennison*, supra; and the Act of April 11, 1901, P.L. 74, §2, 12 P.S. 1582. And the burden of proving the same rests upon the defendant: *Montgomery v. Dennison*, supra; *McAndrew v. Scranton Republican Pub. Co.*, 364 Pa. 504, 72 A. 2d 780 (1950); 53 C.J.S. Libel and Slander §217; Restatement of Torts §613, comment h (1938). Moreover, it is manifestly the fair thing to place upon the defendant the burden of proving truth: *Montgomery v. Dennison*, supra, n. 2 at 263; 9 Wigmore, Evidence § 2486, at 276 (3d ed. 1940)." *Id.* at 448-50, 273 A. 2d at 907-8. (Footnotes omitted). (Emphasis added).

As is thus readily apparent, this aspect of the decision in *Corabi* makes clear that (1) the Court was interpreting the Constitution of the *United States*, and (2) as the common law presumed a libel plaintiff's reputation to be good, and thus presumed the falsity of a defamatory publication, the burden of proving the truth of a defamatory publication was properly placed upon a defendant.

We consider the second of these postulations *infra*. With respect to the first, suffice it to note, in response to the Plaintiffs' contention that *Corabi* is binding upon us, that if the United States Supreme Court has ruled upon the issue, it is the pronouncement of *that* Court, and not *Corabi* that is binding upon us.

(b)

As we have observed, the Plaintiffs next contend that quite apart from *Corabi*, the placement of the burden of proving truth upon a media defendant as required by 42 Pa. C.S.A. §8343(b)(1), is constitutional within the framework of the First Amendment. We, of course, disagree and turn to an examination of the decisions that

underlie our finding 42 Pa. C.S.A. §8343(b)(1) unconstitutional.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (hereinafter, "*New York Times*"), the Court held quite clearly that a public official bears the burden of proving falsity "with convincing clarity". *Id.* at 279-80, 285-86, 84 S. Ct. at 725-26, 728-29, 11 L. Ed. 2d at 706, 710⁵. See also, *Cox Broadcasting Corp. v. Cohen*, *supra*; *Garrison v. Louisiana*, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964); *Goldwater v. Ginzburg*, *supra*.

It is therefore beyond peradventure that the burden of proving falsity is upon libel plaintiffs who are public officials or public figures⁶, and the Plaintiffs do not suggest otherwise. The Plaintiffs assert, however, that since *Corabi* was decided in 1971, no decision of the Supreme Court of the United States has squarely held that the First Amendment precludes the states from placing the burden of proving truth upon a media defendant in a "private" figure libel case. *Plaintiffs' Memorandum*, at 7. The Plaintiffs do concede, however, that "certain courts

5. In *New York Times*, the Court held that the Constitution of the United States prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not". *Id.* at 279-80, 84 S. Ct. at 726, 11 L. Ed. 2d at 706. Such rule obviously places the burden of proving falsity upon a public official. See, R. Sack, *Libel, Slander and Related Problems*, III.3.2, at 135 (1980) (hereinafter, "*Sack*"). See also, to the same effect, *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975); *Goldwater v. Ginzburg*, 414 F. 2d 324 (2d Cir. 1969), *cert. den.*, 396 U.S. 1049, 90 S. Ct. 701, 25 L. Ed. 2d 695 (1970), *reh. den.* 397 U.S. 978, 90 S. Ct. 1085, 25 L. Ed. 2d 274 (1970); *Pape v. Time, Inc.*, 294 F. Sup. 1087 (N.D. Ill. 1969), *rev'd on other grounds*, 419 F. 2d 980 (7th Cir. 1969), *rev'd*, 401 U.S. 279, 91 S. Ct. 633, 28 L. Ed. 2d 45 (1971).

6. The holding of *New York Times* was extended to "public figure" plaintiffs in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).

throughout the nation" have construed *Gertz* to so hold. *Plaintiffs' Memorandum* at 8.

In *Gertz*, decided nearly three and one-half years subsequent to *Corabi*, the Supreme Court of the United States said:

"We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. *It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation.*" *Id.* at 347-48, 94 S. Ct. at 3010-11, 41 L. Ed. 2d at 809-10. (Emphasis added).

Thus, in language the essence of clarity, the Supreme Court of the United States has held that the First Amendment prohibits the imposition of liability upon a media defendant without fault in a private figure libel action. *Id.* And as *Corabi* points out, "as a general rule the falsity of defamatory words is presumed . . ." *Id.* at 449, 273 A. 2d at 908. We reiterate, as we did at the time we declared 42 Pa. C.S.A. §8343(b)(1) to be constitutionally infirm, that a rule, as enunciated in *Corabi* that places the burden of proving truth upon a defendant, when coupled with a presumption of falsity may result in the imposition of liability without fault — precisely the result that *Gertz* forbids. Thus it is that when a trier of fact is unable to determine the truth or falsity of an assertion in a defamatory publication, he must render his decision *against* the party having the burden of proof. In such case, application of 42 Pa. C.S.A. §8343(b)(1), and the *presumption* of falsity, permits liability without fault.

In *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F. 2d 371 (6th Cir. 1981) *cert. granted*, 454 U.S. 962, 102 S. Ct. 500, 70 L. Ed. 2d 377 (1981), *cert. dismissed pursuant to Rule 53*, 454 U.S. 1130, 102 S. Ct. 984, 71 L. Ed. 2d 119 (1982), a "private figure" libel action, the plaintiff filed suit in Tennessee against a media defendant for defamation. The Tennessee courts at the date of trial, followed the common law as set forth in *Restatement of Torts* §§518, 613(2) and placed the burden of proving truth upon a defendant, as an affirmative defense. Although falsity was an element of a cause of action for defamation, *Id.* at §558(a), 581A., once a publication was shown to be defamatory, falsity was presumed.⁷ The trial court (United States District Court For The Western District of Tennessee) in *Wilson v. Scripps-Howard*, *supra*, instructed the jury in accordance with the Tennessee rule and placed the burden of proving truth upon the media defendant. *Id.* at 373.

The Court of Appeals first observed that the question of whether *Gertz* requires that the burden of proving falsity be upon a private figure libel plaintiff was one of first impression for Federal appellate courts. *Id.* at 374. The Court then specifically held that "fault" as that word was used in *Gertz* consists of *two* elements: carelessness and falsity. *Id.* at 375. Reversing the District Court, the *Wilson* Court said:

"This common law allocation of the burden of proof is drawn into question by the constitutional prohibition against liability without fault established in *Gertz*, 418 U.S. at 347-48, 94 S. Ct. at 3010-3011. The language of *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), and later cases makes clear that the burden of demonstrating the falsity of the defamatory statement rests on the plaintiff when the malice standard applies.

7. *Corabi*, as noted, follows this rule. *Id.* at 449, 273 A. 2d at 908.

See, e.g., Garrison v. Louisiana, 379 U.S. 64, 74, 85 S. Ct. 209, 215 13 L.Ed. 2d 125 (1964) (public official must establish that the utterance was false); *Rosenblatt v. Baer*, 383 U.S. 75, 84, 86 S. Ct. 669, 675, 15 L.Ed. 2d 597 (1966) (same).

The same rule requiring the plaintiff to prove falsity is required under the First Amendment in libel cases based on negligence or some other standard of fault of lesser magnitude than malice. The Supreme Court in stating that 'demonstration that an article was true would seem to preclude finding the publisher at fault,' *Time, Inc. v. Firestone*, 424 U.S. 448, 458, 96 S. Ct. 958, 967, 47 L. Ed. 2d 154 (1976), has suggested that falsity is an element of fault in defamation cases.

The Supreme Court has said that before the status quo is changed judicially in libel cases by an award of money damages against the publisher, the First Amendment requires that the plaintiff prove fault. *Falsity is an element of fault under the First Amendment that should be proved and not presumed.* The District Court therefore erred in placing the burden on the defendant. As a matter of federal First Amendment law, the burden must be placed on the plaintiff to show falsity." *Id.* at 374-76. (Emphasis added).

Addressing the reason for its holding and interpretation of *Gertz*, the *Wilson* Court said:

"In addition, a rule that places the burden of proving truth on the defendant permits the imposition of liability without fault in certain situations. '[W]hen the trier of fact is unable to determine the truth or falsity of a proposition of fact, he must render his decision against the party having the bur-

den of proof. Consequently, in a jury trial the judge by allocating the burden of proof decides each issue of fact which the jury is unable to decide.' *E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation* 70-71 (1956). When the jury is uncertain on the issue of the truth or falsity of the statement, as it may have been in the present case, it must find in favor of the plaintiff. A presumption of falsity thus permits liability without fault in the close case, in the case in which the jury is uncertain. See *County Court of Ulster County v. Allen*, 442 U.S. 140, 99 S. Ct. 2213, 2224-30, 60 L. Ed. 2d 777 (1979), a criminal presumption case discussing the significant effect that burden-shifting presumptions may have on the outcome of a close case and requiring a close causal connection between the proved fact and the presumed fact. In libel and slander cases generally, there is no particular causal connection between the proved fact (the making of a derogatory statement) and the presumed fact (the falsity of the statement). There is no particular reason to presume falsity." *Id.* at 375-76.

While not binding upon us, the holding in *Wilson* is indeed persuasive insofar as it interprets *Gertz* and applies the latter to private figure libel actions.

In *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y. 2d 369, 397 N.Y.S. 2d 943, 366 N.E. 2d 1299 (1981), citing *Cox Broadcasting Corp. v. Cohn*, *supra*, the New York Court of Appeals held that in a public figure libel case, the burden is upon the plaintiff to prove the falsity of the publication. *Id.* at 1305. Shortly thereafter, the New York Supreme Court, Appellate Division, in *Fairley v. Peekskill Star Corp.*, 445 N.Y.S. 2d 156, ___ N.E. 2d ___ (1981), citing *Rinaldi*, *supra*, and *Wilson v. Scripps-Howard*, *supra*, as authority, held in a

private figure libel action that the burden of proving falsity was upon the plaintiff. *Fairley v. Peekskill*, 445 N.Y.S. 2d at 158, ___ N.E. 2d at ___.⁸

In *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A. 2d 688 (1976), the Maryland Court of Appeals following *Gertz*, adopted the negligence standard of fault in private figure libel actions and then said,

"It is to be noted that under the negligence standard which we adopt here, truth is no longer an affirmative defense to be established by the defendant, but instead the burden of proving falsity rests

8. Addressing the dichotomy the Plaintiffs at bar endeavor to carve in stone — public figure v. private figure plaintiffs — the *Fairley* Court said:

"The above instances of lack of defamatory meaning, however, are not the only deficiencies in the plaintiff's case. The plaintiff never demonstrated that questions of fact exist concerning the falsity of many of the statements.

We note that at common law the defamed plaintiff had no such burden. The defendant was required to prove truth as a defense (see 1 Seelman, *Law of Libel and Slander in New York*, par 392). More recently, however, in cases against a media defendant, the defamed plaintiff has been required to prove falsity but only after he has been found to be a public official or a public figure. In *Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y. 2d 369, 380, 397 N.Y.S. 2d 943, 366 N.E. 2d 1299, the Court of Appeals stated '[t]his requirement follows naturally from the actual malice standard. Before knowing falsity or reckless disregard for truth can be established, the plaintiff must establish that the statement was, in fact, false.' We see no significant distinction where the plaintiff is held to be a private figure and the topic of the article is a matter of public concern. In such cases the plaintiff is required to prove gross irresponsibility (see *Chapadeau v. Utica Observer Dispatch*, 38 N.Y. 2d 196, 199, 379 N.Y.S. 2d 61, 341 N.E. 2d 569) resulting in a defamatory falsity. Under such circumstances, proof of falsity is again naturally related to the standard of care. Thus, in a case with constitutional implications such as the one at bar, the defamed plaintiff must prove falsity, irrespective of his status (see *Wilson v. Scripps-Howard Broadcasting Co.*, 6 Cir., 642 F. 2d 371)." *Id.* at 158. (Emphasis added).

upon the plaintiff, since, under this standard, he is already required to establish negligence with respect to such falsity." 350 A. 2d at 698.

The same Court, in *General Motors Corporation v. Piskor*, 277 Md. 165, 352 A. 2d 810 (1976), a private figure defamation action, expounded upon its earlier holding in *Jacron*:

"Little need be added here to what we said in *Jacron*, since, like that case, this is one of purely private defamation. There, we read *Gertz* as being applicable to defamation actions brought by private persons without regard to whether the subject matter was one of public or general interest. In adopting the *Gertz* principles as a matter of state law, we held that they applied to cases of slander and libel alike brought against non-media defendants. Accordingly, we held that the negligence standard set forth in Restatement (Second) of Torts §580B (Tent. Draft No. 21, 1975) must be applied in cases of purely private defamation. Under this negligence standard, truth is no longer an affirmative defense; instead, the burden of proving falsity rests upon the plaintiff. Further, fault, in cases of purely private defamation, must be established by the preponderance of the evidence.

In conformity with what was then controlling state law, the trial of the defamation claim in this case proceeded on the premise of liability without fault, rather than upon some greater standard such as negligence. Since the *Gertz* and *Jacron* principles are equally applicable here, we hold that a new trial is required where the plaintiff shall be required to establish the liability of the defendant through proof of falsity and negligence by the preponderance of the

evidence, and may recover compensation limited to actual injury as defined in *Gertz* and *Jacron*." *Id.* at ___, 352 A. 2d at 815. (Footnotes omitted).

Against this background, the United States District Court For the District of Maryland, in *Jenoff v. Hearst Corporation*, (D.C. Md. unreported), a private figure libel action, against a media defendant instructed the jury, in accord with *Jacron*, that the burden upon the plaintiff included the requirement that the plaintiff prove that the defamatory statements were false. The jury returned a verdict for the plaintiff.

Affirming this placement of the burden, the United States Court of Appeals For The Fourth Circuit said, in *Jenoff v. Hearst Corporation*, 644 F.2d 1004 (1981):

"In a charge that was comprehensive, precise and correct in its definitions, and expressed throughout in simple language, the District Court instructed the jury as to the elements of defamation, the allocation of burdens of proof, and the method by which damages were to be proved and calculated. Particularly, the Court charged that to find for Jenoff they must believe that he had shown by a preponderance of the evidence that Hearst's publication of the statements was negligent, that the statements were false and defamatory, and that the statements caused Jenoff's injury. The verdict fulfilled these exactions." *Id.* at 1008.

We turn next to the decisions from Pennsylvania which were available to us at the date of our ruling. In *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (1980), a public figure libel case, the United States Court of Appeals For The Third Circuit, held, as was to be expected, that the plaintiff, as a public figure, must prove "with convincing clarity that the [media defendants] broadcast false statements knowing of their falsity or with reckless disregard of the truth". The Court then said, "There are

two elements to this standard: First [the plaintiff] must prove that at least some of the material contained in the broadcast was false. Second, it must prove that the defendants broadcast such material with [actual malice]" *Id.* at 274-75. In footnote 49, above, and citing *Corabi*, the Court observed, by way of dictum:

"49. Pennsylvania's placement of the burden of proving the truth of the communication on the defendant, *Corabi v. Curtis Publishing Co.*, 441 Pa. at 449-50, 273 A. 2d at 908-09, would appear to be contrary to the constitutional limitations on state libel law enunciated by the Supreme Court. See, e.g., *Gertz*, 418 U.S. at 347 n. 10, 94 S. Ct., at 3010 (rejecting Justice White's view that it would be constitutional for a state to require libel defendants to prove the truth of an allegedly defamatory statement); *New York Times*, 376 U.S. at 271, 84 S. Ct. at 721 ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . and especially one that puts the burden of proving truth on the speaker."). Inasmuch as the district court concluded that there exists a genuine issue of fact regarding the truth of some of the broadcast material, 468 F. Supp. at 783, and because the defendants have not challenged the decision on this appeal, we have no occasion to review either the correctness of the district judge's decision or the constitutionality of Pennsylvania's placement of the burden of proof." *Id.* at 274-75. (Emphasis added).

It should be again noted that *Gertz* was a "private figure" case. As such, the presumed reliance upon its holding by the Court of Appeals would appear to apply to *all* libel cases, whether commenced by public or private figure plaintiffs. Of course, we are aware that dicta in a footnote

to an Opinion by the United States Court of Appeals For The Third Circuit is not binding upon us. Nevertheless, we were and remain persuaded by its logic.

We were next privy to the decision of the same Court in *Medico v. Time, Inc.*, 643 F.2d 134 (1981) rehearing and rehearing en banc den. 643 F.2d 134 (1981). In the Opinion in the latter case, authored by the same Circuit judge who wrote for the Court in *Steaks Unlimited*, supra, once again, by way of dictum, the Court said:

"Although the common law placed the burden of proving truth on the defendant, this allocation may run afoul of recently announced constitutional principles. See note 38 *infra*. Because we dispose of the present case on the basis of the fair report privilege, we have no occasion to resolve this constitutional issue, or to consider whether Pennsylvania courts would continue to apply the republication rule to a newspaper account of defamatory remarks, see Part VII & note 42 *infra*." *Id.* at 137 n. 8.

And again:

"40. Placement on the plaintiff of the burden of demonstrating that a privileged report was not fair and accurate traditionally distinguished the fair report privilege from the truth defense, in which defendant bore the burden of proving truth, see *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 449-50, 273 A. 2d 898, 908-09 (1971). After *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), it is doubtful that a state can place the burden of proving truth on the defendant. *Gertz* held that a plaintiff in a defamation action must be required to demonstrate 'fault' on the part of defendant, *id.* at 347, 94 S. Ct. at 3010, and rejected Justice White's suggestion, offered in dissent, that a publisher may be required to prove the truth of a defamatory statement concerning a private individual, *id.* at

347 n. 10, 94 S. Ct. at 3010 n. 10. We have earlier questioned whether Pennsylvania's placement of the burden of proving truth on the defendant survives *Gertz*, see *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 274 n. 49 (3d Cir. 1980), and at least one member of the Pennsylvania Supreme Court has expressed similar reservations, see *Moyer v. Phillips*, 462 Pa. 395, 341 A. 2d 441, 447 (1975) (Roberts, J., concurring). But see, Eaton, *supra* note 33, at 1381-86, 1429 [sic: n. 34; Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349 (1976)] (*Gertz* tolerates common law rule of presuming falsity of defamatory publication, and placing on defendant burden of proving truth)." *Id.* at 146 n. 40.

Thus, although the Court of Appeals For the Third Circuit has not specifically reached the issue of the placement of the burden of proving truth or falsity, the Court left little doubt as to its view on the subject.

The Supreme Court of Pennsylvania has not squarely considered the issue since its pre-*Gertz* decision in *Corabi*. However, in *Moyer v. Phillips*, 462 Pa. 395, 341 A. 2d 441 (1975) in which the Court decided that a cause of action for libel survives the death of the defendant, Justice Roberts, concurring noted that at common law, the burdens of proving truth and privilege were quite heavy and generally required testimony from a defendant in order to defend the action. Consequently, Justice Roberts wrote, the legislature could quite properly single out a cause of action for libel to abate with the death of the defendant. However, Justice Roberts, joined by Justice Nix, noted:

"... a substantial change in the law of defamation was wrought by the decision of the United States Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789

(1974). That case held that, as a matter of constitutional law, liability for defamation may not be imposed without some showing of fault, amounting at least to negligence, on the part of the defendant. *Id.* at 345, 94 S. Ct. at 3010; see Restatement (Second) of Torts §§580A, 580B (Tent. Draft No. 21, 1975). This change drastically shifts the burden of proof in defamation actions and thereby reduces the unusually heavy burden heretofore placed on defendants in such actions. In proving the necessary element of fault to make out his cause of action, the plaintiff will necessarily have to prove facts that would ordinarily negate the existence of a conditional privilege. *Id.* Topic 3, Special note, at 46-47. Similarly, as a practical matter, the plaintiff will find it necessary to prove the falsity of the statement in order to establish the necessary element of fault; to this extent, the defendant is relieved of the burden of proving truth as a defense. *Id.* §582, comment b., & §580B, comment i." *Id.* at 446-47 (Footnotes omitted) (Emphasis added).

Once again, while the concurring Opinions of two justices of the Supreme Court are not binding upon us, they are persuasive.

Finally, in *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa. Super. 475, 448 A. 2d 6 (1982), *pet. for allowance of appeal den.* Sept. 30, 1982, 301 Pa. Super. 475, 448 A. 2d 6 (1982)⁹, a case involving a libel action by a police sergeant (public official) against a newspaper, Judge Spaeth, writing for a panel of the Superior Court of Pennsylvania and, citing the concurring Opinion of Justice Roberts in *Moyer v. Phillips*, *supra*, and the Decision of the Sixth Circuit in *Wilson v. Scripps-Howard Broadcasting Co.*, *supra*, unequivocally placed the burden of proving falsity upon a libel plaintiff, without ref-

9. *Dunlap* was decided more than two years subsequent to our ruling instantly.

erence to the public figure-private figure dichotomy¹⁰. In doing so, Judge Spaeth wrote:

"In our opinion *Moyer* undermines *Corabi* and its progeny, in both the Pennsylvania and federal courts. Moreover, we are persuaded that the plaintiff should have the burden of proving falsity for the reasons so carefully explained by . . . the Sixth Circuit in *Wilson v. Scripps-Howard Broadcasting Co.* [*supra*] . . ." *Id.* at 488, A. 2d at 13.

And as Judge Spaeth wrote in a footnote:

"8. One commentator has cited *Moyer* as an example of a state court's express recognition of post-*Gertz* burdens of proof:

Before 1964, truth was a 'defense' in defamation cases-which meant that falsity would be assumed unless the defendant pleaded affirmatively that his aspersion was true and then came forward at the trial with evidence of its truth. Once all the proof was in, the defendant had the burden of convincing the court that the disparagement was true. The revolution changed all this: the United States Supreme Court has, by implication, allocated an issue of falsity to the plaintiff by holding that plaintiffs have no cause of action unless they establish the defendants' fault. Public officials or public persons are required by *Times* and *Walker* to establish *Times* malice; and private persons are required by *Gertz* to establish at least negligence. These constitutional burdens requiring plaintiffs to demonstrate the defendants' fault make no sense unless the plaintiff shows that the disparagement was untrue. Statements of defamatory truth are not actionable as either libel or slander. Some state courts have expressly recognized this constitutional reallocation of the burdens

10. Cf. Concurring Opinion by Beck, J.

on the truth issue [footnote citing *Moyer*, omitted]. *Morris on Torts* 350 (2d ed. 1980)." *Id.* at 488 n. 8, 443 A. 2d at 13 n. 8.

The Decision of the panel in *Dunlap* has twice been recently cited by the United States District Court For The Eastern District of Pennsylvania on the question of the burden of proving truth or falsity — under Pennsylvania law. While in no sense binding, and purely dictum, the Decisions should be noted.

In *Lal v. CBS, Inc.*, 551 F. Supp. 356 (E.D. Pa. 1982), Chief Judge Luongo observed in a footnote:

"During oral argument, counsel for CBS directed the court's attention to the Pennsylvania Superior Court's recent decision in *Dunlap v. Philadelphia Newspapers, Inc.*, 448 A. 2d 6 (1982), wherein it was held that the burden of proving the truth of a publication may not constitutionally be placed upon a defendant in a defamation action. Hence, CBS argues under *Dunlap* that it is plaintiff's burden to prove that the broadcast was false. Although I predict that the Pennsylvania Supreme Court would reverse its prior decisions and follow *Dunlap* were it presented with the issue, I need not decide the point at this time. Irrespective of the placement of the burden of proof on the truth defense, an issue of fact would still remain as to whether the broadcast was true or false." *Id.* at 361 n. 3.

And in *Williams v. WCAU-TV*, 555 F. Supp. 198 (E.D. Pa. 1983), Judge Broderick agreed:

"Capital Cities has also asserted that summary judgment should be granted it because its broadcast was substantially true. The Court is aware of the recent decision of Judge Spaeth of the Pennsylvania Superior Court in *Dunlap v. Philadelphia Newspapers, Inc.*, 448 A. 2d 6 (Pa. Super. 1982), holding that, in light of the Supreme Court's decision in

Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), the plaintiff in a defamation action bears the burden of showing the falsity of the publication giving rise to the action. We join with our colleague, Chief Judge Luongo, in predicting that the Pennsylvania Supreme Court will follow *Dunlap* when it is presented with the issue. *Lal v. CBS, Inc.*, 551 F. Supp. 356 at 361 n. 3 (E.D. Pa. 1982). See *Steaks Unlimited, Inc. v. Deaner* [*supra*]."

Other jurisdictions as well place the burden of proving falsity upon a libel plaintiff. See, e.g., *Cianci v. New Times Publishing Co.*, 639 F. 2d 54 (2d Cir. 1980) (public figure); *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 448 A. 2d 1317 (1982) (private figure); *McIntire v. Westinghouse Broadcasting Co.*, 479 F. Supp. 808 (Mass. 1979) (public figure); *Mihalik v. Duprey*, ____ Mass. App. Ct. ____, 417 N.E. 2d 1238 (1981) (public figure); *Brown v. Beney*, 41 N.C. App. 636, 255 S.E. 2d 784 (1979) (private figure); *Mark v. Seattle Times*, 96 Wash. 2d 473, 635 P. 2d 1081 (1981) (private figure); *Sims v. Kiro, Inc.* 20 Wash. App. 229, 580 P. 2d 642 (1978) (private figure); *McHale v. Lake Charles American Press*, ____ La. App. ____, 390 So. 2d 556 (1980) (public figure).

Finally, we turn to the *Restatement (Second) Torts*, adopted and promulgated on May 19, 1976, subsequent to the Decision in *Gertz*.

Section 558 sets forth the elements of a cause of action for defamation:

"§558. Elements Stated

To create liability for defamation there must be:

- (a) a false and defamatory statement concerning another;

- (b) an unprivileged publication to a third party;

- (c) fault amounting at least to negligence on the part of the publisher; and

- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." (Emphasis added).

Comment a. to Section 558 refers the reader to Section 581A with respect to the requirement of falsity. Section 581A provides:

"§581A. True Statements

One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true."

Comments a. and b. to Section 581A state the following:

"Comment:

- a. To create liability for defamation there must be publication of matter that is both defamatory and false. (See §558). There can be no recovery in defamation for a statement of fact that is true, although the statement is made for no good purpose and is inspired by ill will toward the person about whom it is published and is made solely for the purpose of harming him.

Several states have constitutional or statutory provisions to the effect that truth of a defamatory statement of fact is not a defense if the statement is published for 'malicious motives' or if it is not published for 'justifiable ends' or on a matter of public concern. There have been rulings that a provision of this type is unconstitutional, because it is in violation of the First Amendment requirements of freedom of

speech and of the press, and its validity is very dubious. As to an action for violation of the right of privacy by giving unreasonable publicity to details of the private life of another, see §652D.

b. At common law the majority position has been that although the plaintiff must allege falsity in his complaint, the falsity of a defamatory communication is presumed. It has been consistently held that truth is an affirmative defense which must be raised by the defendant and on which he has the burden of proof. The practical effect of this rule has been eroded, however, by the recent Supreme Court holdings that the First Amendment to the Constitution requires a finding of fault on the part of the defendant regarding the truth or falsity of the communication. Pending further elucidation by the Supreme Court, the Institute does not purport to set forth with precision the extent to which the burden of proof as to truth or falsity is now shifted to the plaintiff. See the Caveat to §613, and Comment j."

Section 613 considers the burden of proof in a defamation action. The burden upon the plaintiff includes, *inter alia*, proof of the defamatory character of the communication. *Id.* at (1)(a). The burden upon the defendant is stated as follows:

"In an action for defamation the defendant has the burden of proving, when the issue is properly raised, the presence of the circumstances necessary for the existence of a privilege to publish the defamatory communication." *Id.* at (2).

Immediately following Section 613, the Reporter, post-Gertz, notes this caveat.

"The Institute expresses no opinion on the extent to which the common law rule placing on the defendant the burden of proof to show the truth of

the defamatory communication has been changed by the constitutional requirement that the plaintiff must prove defendant's negligence or greater fault regarding the falsity of the communication."

Lastly, Comment f. to Section 613 provides:

"f. *Defendant's fault regarding truth or falsity.* Under the Constitution, a plaintiff cannot recover unless the defendant acted negligently, recklessly or with knowledge with regard to the falsity and defamatory character of the communication. (See §580B). The plaintiff has the burden of proving the existence of this fault on the part of the defendant. If the plaintiff is a public official or public figure he cannot recover unless the defendant knew of the falsity of the communication or acted in reckless disregard of it. (See §580A). The plaintiff has the burden of proving this knowledge or reckless disregard. The Supreme Court expressly holds that proof in this case must be with 'convincing clarity.' Whether the same standard of proof is required for proof of negligence in an action by a private person has not been indicated by the Court."

In sum, as the *Restatement (Second) Torts* makes clear, there is no cause of action for defamation unless the defamatory communication is also *false*. *Corabi* agrees at 449, 273 A. 2d at 908, but reiterates the rule at common law that as the reputation of the libel plaintiff is *presumed* to be "good," the defamatory communication is *presumed* to be false. *Id.* at 449, 273 A. 2d at 908. In our view, and as *Wilson v. Scripps-Howard Broadcasting Co.*, *supra*, points out, *Id.* at 375-76, the presumption of falsity thus created may well permit liability without fault on the part of a media defendant. Gertz clearly prohibits such result. We thus decided, and remain firm in that position, that the burden of proving falsity is properly placed upon a plaintiff in a libel action against a

newspaper. Nor in this aspect of the subject do we discern a distinction between public figure plaintiffs and private figure plaintiffs. To draw such distinction would, we believe, effectively distort the balance the Court struck in *Gertz* designed to accommodate the competing values at stake in defamation suits by private individuals against media defendants. *Id.* at 345-49, 94 S. Ct. at 3009-12, 41 L. Ed. 2d at 808-10.

Our interpretation of *Gertz* is, as noted, shared by three United States Circuit Courts of Appeal, two panels of the Third Circuit Court of Appeals, two justices of the Supreme Court of Pennsylvania, a panel of the Superior Court of Pennsylvania¹¹, and a number of appellate courts in sister jurisdictions. Thus, we did not find that the Decision in *Corabi* binding upon us, and for the same reasons, found 42 Pa. C.S.A. §8343(b)(1), placing as it does the burden of proving truth upon a media defendant, unconstitutional.

(c)

Continuing their attack upon our ruling that 42 Pa. C.S.A. §8343(b)(1) is unconstitutional, the Plaintiffs contend that as the Defendants failed to follow the mandate of Pa. R.C.P. No. 235(a), they waived their right to assert the unconstitutionality of the statute in question.

Rule 235(a) provides:

"Rule 235. Notice to Attorney General. Constitutionality of Statute

(a) In any proceeding in a court subject to these rules in which an Act of Assembly is alleged to be unconstitutional and the Commonwealth is not a

11. A panel Opinion of the Superior Court, while it cannot overrule a Decision of the Supreme Court, *Commonwealth v. O'Brien*, 273 Pa. Super. 205, 417 A. 2d 236 (1979), has the force of an Opinion of the full Superior Court. *Commonwealth v. Roach*, ___ Pa. Super. ___, 453 A. 2d 1001 (1982).

party, the party raising the question of constitutionality shall promptly give notice thereof by registered mail to the Attorney General of Pennsylvania together with a copy of the pleading or other portion of the record raising the issue and shall file proof of the giving of the notice. The Attorney General may intervene as a party or may be heard without the necessity of intervention. The court in its discretion may stay the proceedings pending the giving of the notice and a reasonable opportunity to the Attorney General to respond thereto. If the circumstances of the case require the court may proceed without prior notice in which event notice shall be given as soon as possible; or the court may proceed without waiting action by the Attorney General in response to a notice."

To properly consider the Plaintiffs' argument, we briefly recite the essential facts. Although the Defendants' counsel in his opening remarks to the jury, by alluding to the burden of proving falsity, may well have by implication alerted all parties to a constitutional challenge, it is clear that the Defendants directly called the constitutionality of the statute into question in the Defendants' "Points For Charge", submitted to the Court at the conclusion of the trial.

The Defendants' Proposed Points Nos. 10, 11 and 38, all request the Court to instruct the jury that the burden of proving that the publications were false was upon the Plaintiffs by a fair preponderance of the evidence. The Defendants' Amendments to their Proposed Points For Charge, in Points Nos. 11 and 38, also request the same instruction. In contradistinction, the Plaintiffs' Proposed Jury Instructions (First Set) Nos. 28 and 29, ask the Court to instruct the jury that the burden of proving the truth of the publications was upon the Defendants.

As is thus obvious, if the Court had adopted the Defendants' Proposed Points it would have been required to act in violation of 42 Pa. C.S.A. §8343(b)(1). The trial judge determined that the conflicting Points submitted on the issue, in light of *Gertz*, and *Wilson v. Scripps-Howard*, sharply focused upon the question of whether 42 Pa. C.S.A. §8343(b)(1) was indeed constitutional. During the course of a "pre-charge" conference, the Court and counsel for the parties discussed the question and the application of Pa. R.C.P. No. 235(a) (N.T. 3541-51). The Court and counsel agreed that to defer a ruling upon the constitutional question until Rule 235(a) was complied with would be prejudicial to all parties (N.T. 3551, 3589-90). The Court thereupon ruled that the statute was unconstitutional insofar as it placed the burden of proving truth upon the Defendants and instructed the jury accordingly.

In so ruling the Court, in the face of the Defendants' failure to comply with Rule 235(a), relied upon the following language of the Rule:

"... If the circumstances of the case require the court may proceed without prior notice in which event notice shall be given as soon as possible ..."

The Court then directed the Defendants to notify the Attorney General as soon as possible (N.T. 3590). The Court's ruling and the Final Charge to the jury both occurred on July 13, 1981. As the record reveals, the Defendants notified the Attorney General the next day, July 14, 1981, in accordance with Rule 235(a). See Proof of Notice Under Rule 235, Exhibit B, filed of record on July 21, 1981. At this writing, more than two years later, the Attorney General has neither intervened nor responded to the Defendants' notification. Notwithstanding this unchallenged recitation of the facts as gleaned from the record, the Plaintiffs insist that the Defendants'

failure to timely comply with the requirements of Rule 235(a) resulted in a waiver of the right to challenge the constitutionality of the statute. We disagree.

Neither our research nor that of the parties has revealed a decision in Pennsylvania interpreting the specific language of the Rule applied by the Court at bar, *supra*. However, 1 *Goodrich-Amram* 2d §235.1 at 390, is instructive on the subject:

"The normal rule is not inflexible. The court in which the action is pending has complete discretion in the administration of the proceedings, and may, in the unusual case, waive all or part of the normal rule. *In the special situation where a waiting period would be prejudicial, the court may permit the proceedings to go forward without any prior notice to the Attorney General and may direct that notice be given 'as soon as possible.'* The court, even if notice has been given, may permit the proceedings to go forward without waiting for the Attorney General to intervene or take any other action.

The Rule carefully avoids any definition of the conditions under which the court may exercise its discretion to waive the normal rule. It authorizes this 'if the circumstances of the case require.' Like all other grants of discretion to a judge in the court of first instance, his actions may be subject to review if he abuses his discretion." (Footnote omitted) (Emphasis added).

We are convinced that the case before us presented that "special situation" referred to in the above-cited passage. The Plaintiffs rely upon several decisions which mandate a result contrary to that reached here. In *all* such cases, however, unlike the case before us, although the constitutionality of various statutes was challenged, fre-

quently for the first time in appellate briefs, the Attorney General was *never* notified. Such decisions, in our view, are not apposite to the case at bar.

Of more significance to us is the discussion on the subject found in *Commonwealth v. Stein*, 487 Pa. 1, 406 A. 2d 1381 (1979), where the appellant orally challenged the constitutionality of a statute in the lower court but failed to notify the Attorney General of the challenge. The lower court failed to address the constitutional challenge and ruled adversely to the appellant. The appellant appealed the adverse ruling to the Superior Court, raised the constitutional challenge again in his appellate brief and thereupon for the first time notified the Attorney General thereof in accordance with Pa. R.C.P. No. 235(a). The Superior Court affirmed. The appellant then appealed to the Supreme Court and again notified the Attorney General. Addressing the issue, the Supreme Court said:

"The respondent next contends that petitioner's failure to notify the Attorney General of the Commonwealth of a constitutional challenge to an Act of Assembly in a proceeding in which the Commonwealth is not a party in violation of Pa. R.C.P. 235(a) pretermits our consideration of petitioner's constitutional claims. The rule requires 'prompt' notification of the Attorney General. Under the circumstances of this case in which the court below proceeded forthwith to the adjudication and disposition of the case without addressing itself to the constitutional questions presented by petitioner and where the Attorney General was duly notified of petitioner's claims on appeal of the matter to the Superior Court and to this Court, and neither sought to intervene in this matter nor to raise the issue of lack of prompt notification as a reason for his decision not to intervene, we cannot

accept this as a basis for refusing to consider the same." *Id.* at 7-8, 406 A. 2d at 1384. (Footnotes omitted).

In *James v. Southeastern Pennsylvania Transportation Authority*, ___ Pa. Super. ___, 459 A. 2d 338 (1983), the appellant also challenged the constitutionality of a statute in the lower court but failed to notify the Attorney General in accordance with Pa. R.C.P. No. 235(a). Again, the lower court failed to address the constitutional issue in its opinion. The appellant appealed to the Superior Court and then notified the Attorney General. Responding to the contention that the issue was waived for the failure to comply with Rule 235(a), the Court said:

"On appeal, the only issue raised is the constitutionality of this now-repealed statute. Notification of the constitutional challenge at this appellate level was given to the Attorney General in accordance with Pa. R.A.P. 521(a). This notification was sent on February 2, 1982 and a reply from the Attorney General's office dated March 2, 1982, states: 'If no notification is received from this Office within 30 days of the date of this letter, please assume that the Commonwealth will not be entering its appearance in these matters.' To date, more than six months after that letter, the Attorney General has not joined this case.

Usually, a rule is a rule. Rule 235, *supra*, requires that the Attorney General be notified of a constitutional challenge to a statute at the trial court level. Normally, non-compliance with this rule would mandate our quashing of this appeal. *Irrera v. SEPTA*, 231 Pa. Super. 508, 331 A. 2d 705 (1974), involved a constitutional challenge to this same stat-

ute and also involved a failure to comply with this same rule. The 'issue was deemed abandoned or waived.' *Irrera*, supra, at 515, 331 A. 2d at 708.

In the case before us, appellant did fail to comply with Rule 235; but he did raise the constitutional issue below, it was not addressed by the trial court, he did notify the Attorney General of the appellate proceedings, and the Attorney General did fail to enter the case.

This same configuration of facts existed in the case of *Commonwealth v. Stein*, 487 Pa. 1, 406 A. 2d 1381 (1979). There, considering those particular circumstances, Justice Nix held that the noncompliance with Rule 235 was not 'a basis for refusing to consider the' constitutional issue. *Stein*, supra, at 8, 406 A. 2d at 1384.

[1] We are willingly guided by Justice Nix's thoughts on this matter, even though they are not in this case binding precedent. Under the circumstances occurring here, the noncompliance with Rule 235 is not fatal and we will address the merits of the constitutional challenge." *Id.* at ____, 459 A. 2d at 340. (Footnotes omitted).

We find the same considerations discussed in *Stein* and *James* to guide us at this level. Clearly the purposes of Rule 235(a) have been served. The Attorney General was notified the day following our ruling on the constitutional question. Although more than two years have transpired, the Attorney General has not intervened and has given no indication that he intends to do so. As in *Stein* and *James*, we do not find late compliance with Rule 235(a) as a reason to have avoided addressing the constitutional issue.

As a corollary to the Plaintiffs' argument concerning Rule 235(a), they also contend that as the Defendants did not raise the question of the constitutionality of 42

Pa. C.S.A. §8343(b)(1), the Court should not have *sua sponte* "reached" for the issue, and to have done so constituted a violation of the clear mandage of *Wiegand v. Wiegand*, 461 Pa. 432, 337 A. 2d 256 (1975).

In *Wiegand*, the Superior Court reversed a Common Pleas Court order on the ground that the statute upon which the lower court based its decision was unconstitutional. In reversing the Superior Court and reinstating the lower court's order, the Supreme Court admonished, after observing that the parties had not raised the constitutional issue in either the lower court or in the Superior Court:

"The Superior Court by sua sponte deciding the constitutional issue exceeded its proper appellate function of deciding controversies presented to it. The court thereby unnecessarily disturbed the processes of orderly judicial decision making. Sua sponte consideration of issues deprives counsel of the opportunity to brief and argue the issues and the court of the benefit of counsel's advocacy. In sua sponte disposition of attacks upon the constitutionality of statutes, the attorney general is denied the opportunity of appearing and responding to the constitutional challenge. See Pa. R.Civ.P. 235(a)." *Id.* at 435, 337 A. 2d at 257.

Contrary to the Plaintiffs' contention, however, the Court at bar did not *sua sponte* reach for and decide the constitutional question. Although the Defendants did not use the language "we ask the court to declare the statute unconstitutional", they did ask the Court "not to follow it" when instructing the jury (N.T. 3545). Obviously, were the Court to have acceded to the Defendants' request without specifically declaring the statute unconstitutional, the same result would have been achieved *sub silentio*. The Plaintiffs obviously agree as reference to the following colloquy between the Court and the Plaintiffs' counsel reveals:

"The Court: They [the Defendants] are not having this court declare it unconstitutional. They are not asking that be done certainly. They are saying it should not be followed for the reason —

Mr. Surkin [Plaintiffs' counsel]: They are suggesting a specific statute, which specifically governs in this case by its terms is unconstitutional. They are not saying the court is acting unconstitutionally, but *they are raising the question of constitutionality of a statute.*

The only way this court can instruct a jury that the burden of proof of falsity is on the plaintiffs is to hold that that section of the statute is unconstitutional." (N.T. 3545) (Emphasis added).

Of similar significance, and as earlier noted, the Defendants' Proposed Points For Charge Nos. 10, 11 and 38, all place the burden of proving falsity on the Plaintiffs and the Plaintiffs' Proposed Points For Charge Nos. 28 and 29, are directly contrary. The issue was clearly drawn during the pre-charge conference and discussed at length (N.T. 3541-52). The parties were afforded the opportunity to brief and argue the issue post-trial and did so. The Attorney General was notified. The concerns underlying the Court's decision in *Wiegand* are in no sense present here, and the Plaintiffs' reliance upon *Wiegand* is misplaced.

2

The Plaintiffs next contend that the Court's refusal to instruct the jury in accordance with the Plaintiffs' Proposed Additional Points For Charge Nos. 59 and 60, was error. Both proposed points concern the failure of the Defendants to call certain witnesses during the presentation of the defense case in chief. As the proposed points relate to several classes of witnesses, we consider them separately.

(a)

The Plaintiffs first argue that as the Defendants failed to call as a witness (1) "an editor to testify concerning the scope of editorial review given to [the allegedly defamatory articles] although [the Defendants] had an editor in the courtroom", (2) an expert to refute the Plaintiffs' damage testimony, although such an expert was also present in the courtroom, or (3) two disclosed sources, Alexander Jaffurs or Edward Hussie, the Court should have given the jury the following instruction:

"59. In producing evidence in support of their contentions, defendants did not call any editor to testify concerning the scope of the editorial review given to these articles, they did not call any witnesses concerning plaintiffs' damage presentation, and they did not call as witnesses any sources other than Richard Doran. In particular, defendants did not call as a witness either Alexander Jaffurs or Edward Hussie. The general rule is that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and without satisfactory explanation, he fails to do so, an inference may be drawn that the evidence if produced would be unfavorable to him. The failure to call an available witness possessing peculiar knowledge concerning facts essential to a party's case gives rise to an inference that the testimony of such uninterrogated witness would not sustain the contention of that party. However, the rule is not operative unless it appears to you that the absent witness has peculiar knowledge or means of knowledge rendering his testimony of importance to the party in a position to call him, and it must first appear that this knowledge exists before the rule can be invoked.

Your inquiry on this point will be: (1) Is the absent witness available, or has his absence been satisfactorily explained? (2) Does the absent witness possess peculiar knowledge or means of knowledge rendering his testimony of importance to the party in a position to call him? If the witness is available and does possess such peculiar knowledge, then the jury may infer from the fact that he was not called that if he had been produced his testimony would have been unfavorable to the party whose duty it was to call him. Laub, Trial Guide, §596."

The proposed point is, in effect, nothing more than the usual "adverse inference" or "missing witness" instruction, to be given in appropriate circumstances when a party fails to call a witness. See Pa. SSJI (Civ) 5.06.

The Supreme Court of Pennsylvania, in *Commonwealth v. Newmiller*, 487 Pa. 410, 409 A.2d 334 (1979), quoted the Superior Court in *Commonwealth v. Birch*, 240 Pa. Super. 587, 361 A.2d 737 (1976), upon the question of when a jury is permitted to draw an adverse inference:

"As the Superior Court stated:

"The criteria required before an inference can be drawn from the failure of a party to produce a witness are well-established. " 'Where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, without satisfactory explanation he fails to do so, the jury may draw an inference that it would be unfavorable to him.' *Wills v. Hardcastle*, 19 Pa. Super. 525, 529 (1902); *Green v. Brooks*, 215 Pa. 492, 496, 64 A. 672 (1906); *Hass v. Kasnot*, 371 Pa. 580, 584, 585, 92 A.2d 171 (1952). *The person not produced must be within the power of the party to produce.* II Wigmore on Evidence,

§286." *Commonwealth v. Trignani*, 185 Pa. Super. 332, 340, 138 A.2d 215, 219, *aff'd*, 393 Pa. 140, 142 A.2d 160 (1958) (emphasis added). In *Commonwealth v. Jones*, 455 Pa. 488, 495, 317 A.2d 233, 237 (1974) our Supreme Court articulated the "missing witness" inference rule as follows: " '[W]hen a potential witness is available to only one of the parties to a trial, and it appears this witness has special information material to the issue, and this person's testimony would not be merely cumulative, then if such party does not produce the testimony of this witness, the jury may draw an inference it would have been unfavorable. (Emphasis added.) See McCormick, Law of Evidence, 534 (1954). See also *Bentivoglio v. Ralston*, 447 Pa. 24, 288 A.2d 745 (1972), and *Commonwealth v. Wright*, 444 Pa. 536, 282 A.2d 323 (1971).' *Commonwealth v. Moore*, 453 Pa. 302, 305, 309 A.2d 569, 570 (1973)." (Emphasis in *Commonwealth v. Bird*.)

"The instruction in the instant case permitted the jury to draw an inference against the appellant for the failure to call Ault to the stand. On the basis of the record before us to allow such an inference to be drawn was error. After a thorough review of the record, we are unable to find any evidence which establishes that Ault was "peculiarly within the knowledge and reach" *Bentivoglio v. Ralston*, 447 Pa. 24, 29, 288 A.2d 745, 748 (1972) of the appellant such that the jury might be permitted to draw the inference that Ault's testimony would have been unfavorable to the appellant. Absent such evidence the criterion articulated in *Commonwealth v. Jones*, *supra*, that the potential witness must be "avail-

able to only one of the parties" has not been satisfied.' *Commonwealth v. Bird*, *supra*, at 591, 592, 361 A.2d at 739. (Footnote omitted.)

Further, in *Bird*, the Commonwealth argued that no error was committed in giving the charge because the witness was equally available to both parties. As the Superior Court stated:

'... to the extent Ault was "equally available" to both parties, the law is clear that no inference may be drawn against either party. See *Bentivoglio v. Ralston*, *supra* at 29, 288 A.2d at 748. The evidence produced at trial simply does not establish the requisite foundation for permitting the jury to draw an inference against the appellant for the failure to call Ault as a witness.' *Commonwealth v. Bird*, *supra*, at 592, 361 A.2d at 740.' " *Commonwealth v. Newmiller*, *supra* at 419, 409 A.2d at 838-39.

And see, *Commonwealth v. Jones*, 455 Pa. 488, 317 A.2d 233 (1974); *Commonwealth v. Carey*, ____ Pa. Super. ____, 459 A.2d 389 (1983) (citing cases).

Instantly, it is clear that Messrs. Jaffurs and Hussie, as well as the Defendants' editor, seated in the courtroom and obviously known to the Plaintiffs, were not "peculiarly within the knowledge and reach" of the Defendants alone, but were, rather, equally available to the Plaintiffs, as well. Thus, the instruction was properly refused as to such witnesses.

With respect to the failure of the Defendants to produce any witnesses to refute the Plaintiffs' expert testimony concerning damages, we again find that the proposed instruction was again properly refused. The burden of proving damages was upon the Plaintiffs. 42 Pa. C.S.A. §8343(a)(6). Apparently, as a matter of trial strategy, the Defendants chose to extensively cross-examine the Plaintiffs' damage expert rather than produce an ex-

pert to refute the Plaintiffs' evidence. We are unaware of any authority and the Plaintiffs have cited none, that requires the non-burdened party to produce an expert or any other witness to refute testimony upon an issue produced by the party with the burden of proof at the risk of suffering the sting of an "adverse inference" instruction.

The ultimate sanction for the failure of a defendant to produce witnesses upon the question of damages is an adverse verdict. The Plaintiffs at bar apparently suggest that when a defendant fails to produce witnesses upon any issue upon which a plaintiff has the burden of proof, a court must instruct upon the adverse inference. Such suggestion would in effect *remove* the burden of proving damages from the plaintiff and place the burden of *refuting* damages upon the defendant. As there was no burden of proof upon the Defendants on the issue of damages, the instruction was properly refused. See, *Hertz Corp. v. Hardy*, 197 Pa. Super. 466, 473, 178 A.2d 833, 837 (1962); *Raffaele v. Andrews*, 197 Pa. Super. 368, 370, 178 A.2d 847, 849 (1962) (both limiting the "adverse inference" rule to non-production by the party having the burden of proof); 14 P.L.E. §32; Pa. SSJI (Civ) 5.06, Subcommittee Note.

(b)

The Plaintiffs next assert that the refusal to instruct the jury upon the Plaintiffs' Proposed Point No. 60, constituted error. During the course of their trial testimony, the Defendant reporters, Ecenbarger and Lambert, continually referred to several confidential sources and when asked, refused to reveal the identities of such sources. As a result of such refusal, the Plaintiffs presented Proposed Point For Charge No. 60, as amended. The Proposed Point follows:

"60. Under the law of Pennsylvania, members of the media have a statutory right, which defendants have chosen to exercise in this case, to refuse to

identify certain sources of information upon which they claim their articles were based, at least in part. The obvious impact of defendants' exercise of that statutory right in this case has been that plaintiffs were unable to question those sources, to determine their reliability or lack of reliability, to learn from the sources themselves what it was that they told to defendants, and otherwise to fully cross-examine these sources and probe their credibility and that of the reporters who relied upon them. You the jury may consider both defendants' decision to exercise this statutory right, and the effect that it has had upon plaintiffs' presentation at this trial as described above, in reaching your verdict. In other words, it is for you to decide what inferences, if any, should be drawn from defendants' failure to identify certain sources. You may infer, as you deem appropriate, that that defendants were simply endeavoring to protect their sources, or you may infer that, if the sources had been identified, that would have enabled plaintiffs to develop evidence adverse to defendants concerning the truth of the information supplied, and the *existence*, reliability and credibility of the sources." (Emphasis added).

The Court refused to instruct the jury upon the Plaintiffs' Proposed Point upon the ground that to charge the jury in such fashion would effectively emasculate the so-called Shield Law of Pennsylvania¹².

In support of their Proposed Point, the Plaintiffs argue that as interpreted by the Supreme Court in *Taylor and Selby Appeals*, 412 Pa. 32, 193 A. 2d 181 (1963) (hereinafter, "*Taylor*"), "the scope of protection afforded by the Shield Law is determined by the reporter himself: any source which the reporter does not actually publish

12. Act of 1976, July 9, P.L. 586, No. 142, §2, effective June 27, 1978, 42 Pa. C.S.A. §5942, substantially reenacting the Act of 1937, June 25, P.L. 2133, No. 433, §1, 28 P.S. §330.

or publicly disclose shall remain confidential". *Plaintiffs' Memorandum* at 28. As a result, the Plaintiffs contend, there is no effective method of preventing abuse of the privilege afforded by the Shield Law unless the jury is instructed specifically that:

"it need not accept the reporter's assertion of the Shield Law with blind faith; that it should itself examine the reporter's claim of privilege in light of all the facts in the case; and that it may, if it felt the facts so warranted, conclude that the reporter was not really trying to protect confidential sources, but rather to use the Shield Law solely or primarily to prevent plaintiffs from challenging the existence, reliability and credibility of the sources themselves, because the reporter felt that such a challenge might succeed." *Plaintiffs' Memorandum* at 29-30.

Before we explore the tensions existing between the privilege afforded news reporters by the Shield Law, on the one hand, and the "adverse inference" instruction requested by the Plaintiffs, on the other, it should be noted that the Court twice fully instructed the jury upon the tests of credibility to be applied to the testimony of each witness, including, of course, the testimony of the reporter-witness (N.T. 23-26, 3812-14)¹³. Thus, the jury was, under these instructions, free to believe or disbelieve the reporters' testimony concerning the existence and reliability of confidential sources.

We begin our analysis with the observation that the privilege accorded news reporters by the Shield Law in Pennsylvania is virtually absolute, and the policy underlying this absolute privilege is well stated in *Taylor*:

13. Indeed, as the Defendants suggest, application of the tests of credibility, as applied to the testimony of *all* witnesses, is the "mechanism" designed to prevent abuse of the Shield Law by a reporter. *Defendants' Memorandum* at 41-42.

"It is a matter of widespread common and therefore of Judicial knowledge that newspapers and news media are the principal source of news concerning daily local, State, National and international events. We would be unrealistic if we did not take judicial notice of another matter of wide public knowledge and great importance, namely, that important information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public duty, bribery, corruption, conspiracy and other crimes committed or possibly committed by public officials or by powerful individuals or organizations, unless newsmen are able to *fully and completely* protect the sources of their information. It is vitally important that this public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion.

The District Attorney points out that such a construction of 'non-disclosure of source' will enable newsmen to conceal or cover up crimes. This is correct. However, we are convinced that the public welfare will be benefited more extensively and to a far greater degree by protection of all sources of disclosure of crime, conspiracy and corruption than it would be by the occasional disclosure of the sources of newspaper information concerning a crime! Furthermore, this has been the public policy in Pennsylvania in respect to various relationships since 1887. For example, a client can confess to his attorney that he has committed a crime, but the disclosure of crime cannot be given by the attorney unless the client waives his privilege; and a person can confess to his clergyman, priest, rabbi or minister of the gospel that he or some named person has committed a crime, but the disclosure cannot be given unless the confessor waives his privilege.

In each of these cases the Legislature has declared as a matter of public policy that information concerning the crime need not be disclosed by the lawyer or clergyman, as the case may be, even though the non-disclosure protects a criminal. The Act of 1937 is a wise and salutary declaration of public policy whose spiritual father is the revered Constitutionally ordained freedom of the press. *The Act must therefore, we repeat, be liberally and broadly construed in order to carry out the clear objective and intent of the Legislature which has placed the gathering and the protection of the source of news as of greater importance to the public interest and of more value to the public welfare than the disclosure of the alleged crime or the alleged criminal.*" *Id.* at 41-42. (Emphasis partly in original) (Footnotes omitted).

As is thus apparent, the Supreme Court has directed that we "liberally and broadly" construe the statutory privilege accorded newsmen to refuse to divulge the names of confidential sources — in the public interest. To instruct a jury, in the face of the Shield Law thus construed, that it might conclude that there were *no* such sources would, in our view, render the privilege a nullity.

In *Maressa v. New Jersey Monthly*, ___ N.J. ___, 445 A. 2d 376 (1983), the New Jersey Supreme Court was called upon to decide whether the State's Shield Law¹⁴, permits reporters to refuse to disclose their confidential sources in libel cases, and if it does, whether a jury may be permitted to draw an adverse inference from a reporter's failure to identify confidential sources.

It should first be noted that unlike Pennsylvania's Shield Law, the New Jersey statute specifically provides that the trier of fact may *not* draw any adverse inference from the exercise of the privilege not to disclose confi-

14. N.J.S.A. §2.A:34A-21.

dential sources: N.J.S.A. §2A:84A-31. Rule 39. Nevertheless, the *Maressa* Court's policy determination for holding a reporter's privilege to be absolute is instructive and, we think, apposite at bar.

The *Maressa* Court first notes that "the State has created the [defamation] cause of action and hence . . . it can limit, modify or perhaps take it away through the operation of testimonial privileges, absent any claim of constitutional deprivation". *Id.* at ____, 445 A.2d at 384, (citing *Mazzella v. Philadelphia Newspapers, Inc.*, 479 F. Supp. 523 (E.D.N.Y. 1979) (applying Pennsylvania Law)).

The *Maressa* Court then elucidated its high regard for the testimonial privilege accorded reporters:

"We have sustained testimonial privileges, even at the cost of denying a party information possibly vital to his action, 'because in the particular area concerned, they are regarded as serving a more important public interest than the need for full disclosure.' *State v. Briley*, 53 N.J. at 506, 251 A.2d 442. In *Cashen v. Spann*, 66 N.J. 541, 556, 334 A.2d 8 (1975), *cert. den.* 423 U.S. 829, 96 S. Ct. 48, 46 L. Ed. 2d 46 (1975), the Court 'emphasize[d] that in civil cases in which disclosure is sought . . . for the purpose of asserting claims for money damages, the interests of the State in maintaining . . . confidentiality . . . are entitled to a greater degree of respect.' Federal courts have also noted that plaintiffs in civil actions do not have a compelling interest in obtaining confidential information. See *e.g.*, *Baker v. F. & F. Investment*, 470 F.2d 778, 785 (2d Cir. 1972), *cert. den.*, 411 U.S. 966, 93 S. Ct. 2147, 36 L. Ed. 2d 686 (1973); *Democratic National Committee v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973)." *Id.* at 445 A.2d at 385.

In sum, *Maressa* determined that the burden placed upon a libel plaintiff by the operation of a shield law must

be tolerated as the testimonial privilege served a more important public interest than the necessity of full disclosure. The same reasoning applies at bar, as is clearly noted in *Taylor, supra*.

It must also be observed that the so-called adverse inference is a principle of evidence. *Commonwealth v. Moore*, 453 Pa. 302, 309 A.2d 569 (1973); *Steel v. Snyder*, 295 Pa. 120, 127-28, 144 A. 912, 914-15 (1929). If this evidentiary principle is permitted to operate in a libel case, in the face of the Shield Law and the broad interpretation accorded that Law in *Taylor*, we should surely be in the position of giving a reporter the protection of the Shield Law with one hand and removing it with the other. We do not subscribe to the view that *Taylor* permits such result.

Professor McCormick has also examined the question of the practical limitation on the exercise of testimonial privileges when adverse inferences are permitted to be drawn when such privileges are claimed. *McCormick on Evidence* (Cleary 2 ed. 1972) §§76, 272. McCormick first notes that the United States Supreme Court in *Griffith v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), held that permitting comment upon the failure of a defendant to testify violates his Fifth Amendment privilege against self-incrimination "by making its assertion costly". *Id.* at 614, 85 S. Ct. at 1233, 14 L. Ed. at 110.

McCormick then suggests that the principle of *Griffin v. California, supra*, should be applied to testimonial privileges that are soundly based in policy. Such privileges, in McCormick's view, should be accorded the fullest protection. *Id.* at 156. The strong public policy underlying the Shield Law in Pennsylvania is clearly articulated in *Taylor*. See also, *Steaks Unlimited, Inc. v. Deaner, supra* at 279; *Mazzella v. Philadelphia Newspapers, Inc., supra* at 525, 528-29; *Hepps v. Philadelphia Newspapers, Inc., supra* at 714. Thus, the application of Professor McCormick's postulation, and the succinct

holding in *Taylor* compels the conclusion that the Shield Law must prevail and that the Court did not err in refusing the Plaintiffs' requested adverse inference instruction.

3

In several of the allegedly defamatory articles, the Defendant reporter William Ecenbarger reported upon a decision of the Court of Common Pleas of Lancaster County and the legal proceedings in that Court involving the Plaintiffs that led to the decision. The Plaintiffs contended at trial and in their post-trial argument that Ecenbarger's reports interpreting the proceedings and the decision were incorrect and the most damaging to the Plaintiffs of several possible interpretations. At the conclusion of the trial, the Plaintiffs requested the Court to instruct the jury in accordance with Plaintiffs' Proposed Point No. 27, as follows:

"27. When a reporter undertakes to report to the public the results of a judicial proceeding the meaning of which might be unclear, the reporter does not have the right to choose from among several possible interpretations and publish only the interpretation most damaging to the Plaintiffs. If he decides to proceed in this fashion, he must not only show that his interpretation was plausible, but also that it was correct. *If the interpretation chosen and reported by the reporter is not correct, that can constitute negligence on his part.*" (Emphasis added).

The Court refused to instruct the jury in accordance with the Plaintiffs' Proposed Point and the Plaintiffs now assert, in support of their Motion for a new trial, that the Court thus committed error.

The Plaintiffs' contention is based upon a "rule" they perceive to have been enunciated by Justice Rehnquist in his plurality Opinion in *Time, Inc. v. Firestone*, 424

U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976). Such "rule", the Plaintiffs contend, is to be applied in private figure libel cases in which a media defendant reports the outcome of a judicial proceeding. *Plaintiffs' Memorandum* at 32.

In their Memorandum, the Plaintiffs quote that part of Justice Rehnquist's Opinion they contend sets forth the "rule" upon which their Proposed Point is based:

"Petitioner may well argue that the meaning of the trial court's decree was unclear, but this does not license it to choose from among several conceivable interpretations the one most damaging to respondent. Having chosen to follow this tack, petitioner must be able to establish not merely that the item reported was a conceivable or plausible interpretation of the decree, but that the item was factually correct. We believe there is ample support for the jury's conclusion, affirmed by the Supreme Court of Florida, that this was not the case. There was, therefore, sufficient basis for imposing liability upon petitioner if the constitutional limitations we announced in *Gertz* have been satisfied." *Plaintiffs' Memorandum* at 32.¹⁵

The Plaintiffs argue that Ecenbarger's interpretation of the Lancaster County proceedings as reported by him and published by the *Inquirer*, was the most damaging of all possible interpretations and that such interpretation was incorrect. *Plaintiffs' Memorandum* at 33. Thus, the Plaintiffs assert, the jury at bar was required to decide two issues: (1) which of several possible interpretations

15. The Plaintiffs' quotation fortuitously omits the last sentence of the paragraph:

"... These are a prohibition against imposing liability without fault ... and the requirement that compensatory awards 'be supported by competent evidence concerning the injury'." *Time, Inc. v. Firestone*, *supra* at 459, 96 S. Ct. at 968, 47 L. Ed. 2d at 166.

was correct, and (2) was Eckenbarger's interpretation the most damaging to the Plaintiffs? The Plaintiffs contend that since such issues were before the jury, Proposed Point No. 27 should have been given so as to enable the jury to understand the conclusion it might reach upon resolving the foregoing factual issues.

As is easily seen, the Plaintiffs' Proposed Point requests an instruction to the effect that the choice and publication of an interpretation of an ambiguous judicial proceeding damaging to a plaintiff may, without more, constitute negligence unless the reporter proves that the interpretation chosen and reported was correct. In our view, the Proposed Point represents a serious misperception of the law.

At the outset, the Proposed Point, by requiring the reporter to prove the accuracy of his interpretation or suffer a finding of negligence, in effect asserts that falsity and negligence are one in the same and places the burden of proving freedom from both upon the reporter. Thus, the Plaintiffs again request that the burden of proving truth be placed upon the libel defendant, and again, we find this constitutionally impermissible. *See, Subpart 1, supra; Gertz, supra.*

Of similar significance, our reading of *Time, Inc. v. Firestone, supra*, belies the Plaintiffs' assertion that the "rule" allegedly announced by Justice Rehnquist was indeed a rule at all or represented a holding in the case. The paragraph cited by the Plaintiffs was merely a response to a contention advanced on appeal by Time, Inc. The Supreme Court after determining that there was sufficient evidence to support a finding that Time, Inc. had selected and published an incorrect interpretation of a judicial proceeding, noted that "the prohibition against imposing liability without fault" remained to be overcome. Thus, it is clear that selecting and publishing an incorrect interpretation of a judicial proceeding that is damaging to a plaintiff is not *alone* sufficient to impose liability and is thus not sufficient to support a finding of

negligence. The Plaintiffs' Proposed Point No. 27 was properly refused.

In their Complaint, the Plaintiffs asserted, *inter alia*, that the Defendants acted with actual malice, and coupled this assertion with a demand for punitive damages. *Plaintiffs' Complaint*, Paras. 10, 13, 15, 23, 25, 30, 35, 40, 43, 45, 50, 53, 55. At the conclusion of the Plaintiffs' case and following argument on the issue, the Court ruled that "... no reasonable jury can find actual malice on the part of the reporter defendants, and accordingly, the issue of punitive damages is withdrawn from the jury's consideration" (N.T. 3310).

As their final assertion of error, the Plaintiffs contend that the issue of punitive damages should have been submitted to the jury and not withdrawn by the Court. Underlying the Plaintiffs' argument is the further contention that the Plaintiffs produced sufficient evidence of actual malice on the part of the Defendants to permit the jury to award the Plaintiffs punitive damages. *Plaintiffs' Memorandum* at 34-46. *See Gertz, supra* at 349-50, 94 S. Ct. at 3011-12, 41 L. Ed. 2d at 810-11.

As interesting as the Plaintiffs' final issue may be, we need not and thus do not reach it, as it will be recalled that before a court may grant a new trial upon the basis of errors made at trial, it must conclude that such errors led to an incorrect result, *Warren v. Mosites Construction Co.*, 253 Pa. Super. 395, 403, 385 A.2d 397, 401 (1978), and it is incumbent upon the moving party to "demonstrate in what way the trial error[s] caused such incorrect result", *Nebel v. Mauk*, 434 Pa. 315, 318, 253 A.2d 249, 251 (1969). *See also Seovich v. Commonwealth*, 434 Pa. 68, 252 A.2d 644 (1969).

At bar, the Plaintiffs have failed to demonstrate that the failure of the Court to instruct the jury upon the issue of punitive damages could have, in any respect, properly

affected the verdict. The jury found the Defendants not liable to the Plaintiffs following a trial at which the Plaintiffs presented full and complete evidence concerning liability and damages. The only evidence prohibited as the result of the Court withdrawing the issue of punitive damages from the jury was evidence of the Defendants' net worth. See *Feld v. Merriam*, ____ Pa. Super. ____, ____, 461 A.2d 225, 237-38 (1983) (Collects cases). Obviously, as the jury found the Defendants not liable to the Plaintiffs, the jury never reached the issue of damages. Thus, even if the Court *had* instructed the jury upon the issue of punitive damages, such instruction would have made no difference in the result. Accordingly, the failure to instruct upon punitive damages is irrelevant, and if error, was and remains error in the abstract. *Warren v. Mosites Construction Co.*, *supra*.¹⁶

It should also be noted that in order to recover punitive damages, the Plaintiffs were required to prove "actual malice" on the part of the Defendants by clear and convincing evidence¹⁷, *New York Times Co. v. Sullivan*, *supra*; *Gertz*, *supra*. On the other hand, to recover compensatory or "actual" damages, the Plaintiffs, as private figures, were required to prove negligence on the part of the Defendants, merely by a preponderance of the evidence. The "clear and convincing" standard is of course more burdensome and difficult to carry than the "mere preponderance" standard. The jury, by its verdict, indicated clearly that the Plaintiffs had failed to carry their "mere preponderance" burden. Certainly, if the Plaintiffs

16. We therefore inevitably conclude that the only purpose to be served by instructing the jury upon the subject of punitive damages would have been to prejudice the jury against the Defendants.

17. This burden of proof is explicated in *Matter of Jackson*, 302 Pa. Super. 369, 374, 448 A.2d 1087, 1089 (1982), *quoting in part In re Jackson*, 267 Pa. Super. 428, 431, 406 A.2d 1116, 1118, which, in turn, *quotes LaRocca Trust*, 411 Pa. 633, 640, 192 A.2d 409, 413 (1963).

failed to carry their lesser burden, they surely could not have overcome the burden of proving actual malice by clear and convincing evidence. There was no error.

Thus finding the Plaintiffs' contentions to be without merit, we denied their Motion for a new trial.

BY THE COURT;

J.

Filed: October 24, 1983.

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APPENDIX 3
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

MAURICE S. HEPPS, et al., : No. 18 E.D. Appeal Docket 1983
Appellants :
: (C.P. Chester, Civil Action-Law,
v. : No. 36 May Term, 1976)
: PHILADELPHIA NEWSPAPERS,
INC., et al. :
:
:
:

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the trial court is reversed and a new trial is awarded. The new trial will be confined to a determination of defendant's liability and the assessment of compensatory damages if the liability issue is decided in favor of the plaintiff.

BY THE COURT:

Marlene F. Lachman, Esq.
Prothonotary

Dated: December 14, 1984

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APPENDIX 4

IN THE SUPREME COURT OF PENNSYLVANIA
FOR THE EASTERN DISTRICT

MAURICE S. HEPPS, et al.,	:	No. 18
	:	
<i>Appellants</i>	:	E.D. Appeal
	:	Docket 1983
<i>v.</i>	:	
	:	
PHILADELPHIA NEWSPAPERS,	:	
INC., et al.,	:	
<i>Appellees</i>	:	

NOTICE OF APPEAL

Notice is hereby given that appellees Philadelphia Newspapers, Inc., William Ecenbarger and William Lambert hereby appeal to the Supreme Court of the United States from the Judgment of the Supreme Court of Pennsylvania, dated December 14, 1984, reversing the order of the trial court and awarding a new trial to appellants herein.

This appeal is taken pursuant to 28 U.S.C. §1257(2), in that there was drawn into question before this Court the validity of a statute of the Commonwealth of Pennsylvania on the ground of it being repugnant to the Constitution of the United States, and the decision of this Honorable Court was in favor of its validity.

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KATHERINE HATTON
Attorneys for Appellees

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Dated: March 14, 1985

FILED

APR 12 1985

ALEXANDER L. STEVAS.
CLERK

NO. 84-1491

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PHILADELPHIA NEWSPAPERS, INC., et al.

Appellants

v.

MAURICE S. HEPPS, et al.

Appellees

On Appeal From the Judgment of the
Supreme Court of Pennsylvania

MOTION TO DISMISS APPEAL, OR IN THE
ALTERNATIVE TO AFFIRM JUDGMENT

Edwin P. Rome
Ronald H. Surkin

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1. List of cases and pages
about which the following
table is prepared. The table
is prepared for the purpose of
providing a quick reference to
the cases cited in the text.

2. List of statutes and rules
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the text. The table is prepared
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quick reference to the statutes
and rules cited in the text.

(iii)

COUNTERSTATEMENT OF THE CASE

The procedural history and facts set forth by defendants (appellants in this Court) are incomplete. The following matters are also relevant:

1. During the course of pre-trial discovery, the trial judge ruled, based upon Pennsylvania's Shield Law, 42 Pa. C.S.A. §5942(a),^{1/}

^{1/} 42 Pa. C.S.A. §5942(a) provides:

No person engaged in, connected with, or employed by a newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

COUNTERSTATEMENT OF THE CASE

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3. that plaintiffs were precluded from conducting any discovery regarding sources of information upon which defendants relied in publishing the articles in suit. Hepps v. Philadelphia Newspapers, Inc., 3 Pa. D. & C. 3d 693 (1977).
2. Throughout the articles there are references to "confidential" sources upon which the most damaging statements "linking" plaintiffs to organized crime were based. The defendant-reporters acknowledged from the witness stand their reliance on these confidential sources, but refused to identify them, based on the Shield Law. The trial court consistently upheld this claim of privilege during trial.

notice given to the
Pennsylvania Attorney General, Pa.

3. Plaintiffs requested the trial court to instruct the jurors that they had the right to draw adverse inferences from defendants' refusal to identify sources, but the trial court declined on the ground that to do so would undercut the Shield Law.
4. The trial court's ruling that the Pennsylvania statute, 42 Pa. C.S.A. §8343(b)(1), which places the burden of proving truth on a defendant, was unconstitutional was made sua sponte during the colloquy on the parties' proposed points for charge. Pennsylvania practice requires that the issue of the constitutionality of a state statute be raised in the pleadings and notice given to the Pennsylvania Attorney General, Pa.

R.C.P. 235(a),^{2/} or else it is deemed waived. Irrera v. SEPTA, 231 Pa. Super. 508, 515, 331 A.2d 705 (1974). However, defendants

2/ Rule 235. Notice to Attorney General.
Constitutionality of Statute.

(a) In any proceeding in a court subject to these rules in which an Act of Assembly is alleged to be unconstitutional and the Commonwealth is not a party, the party raising the question of constitutionality shall promptly give notice thereof by registered mail to the Attorney General of Pennsylvania together with a copy of the pleading or other portion of the record raising the issue and shall file proof of the giving of the notice. The Attorney General may intervene as a party or may be heard without the necessity of intervention. The court in its discretion may stay the proceedings pending the giving of the notice and a reasonable opportunity to the Attorney General to respond thereto. If the circumstances of the case require the court may proceed without prior notice in which event notice shall be given as soon as possible; or the court may proceed without waiting action by the Attorney General in response to a notice.

never requested the trial court to declare the statute unconstitutional. Indeed, during the colloquy, defense counsel explicitly stated that he was not asking the court to declare the statute unconstitutional. Plaintiffs therefore contended that defendants waived their right to assert that the statute was unconstitutional. The trial court rejected this argument, and the Pennsylvania Supreme Court did not address it because it decided that the statute was constitutional.

REASONS WHY THE APPEAL SHOULD BE DISMISSED, OR THE JUDGMENT AFFIRMED

A. Defendants Waived Their Right To Challenge The Constitutionality Of The Statute.

As noted above, in the course of five years of pretrial proceedings, and through

5-1/2 weeks of trial, defendants followed none of the procedures required to raise the issue of the unconstitutionality of a state statute. Further, near the end of the trial, when the court explicitly inquired, defense counsel disclaimed any intention to request the court to declare the statute imposing on the defendant the burden of proving truth unconstitutional. The trial court nonetheless declared the statute unconstitutional, and instructed the jury that plaintiffs had the burden of proving falsity.

In its opinion denying plaintiff's motion for a new trial, the trial court explained the reasons why it felt that defendants had not waived their rights. A-54 - A-62.^{3/} However, this decision is

^{3/} Page references are to the Appendix to Appellants' Jurisdictional Statement.

inconsistent with numerous Pennsylvania appellate decisions, including Wiegand v. Wiegand, 461 Pa. 482, 337 A.2d 256 (1975); Superior Mining Co. Property Tax Sale, 359 Pa. 357, 363, 59 A.2d 301 (1948); Irrera v. SEPTA, 231 Pa. Super. 508, 515, 331 A.2d 705 (1974); and Commonwealth ex rel. Bulson v. Bulson, 278 Pa. Super. 6, 419 A.2d 1327, 1328 note (1980).

Plaintiffs briefed and argued the issue of waiver to the Pennsylvania Supreme Court. That court did not reach the issue, however, because it determined that the statute was constitutional. Plaintiffs submit, however, that had the Pennsylvania Supreme Court considered the question, it would have followed its own earlier decisions cited above and ruled that defendants had waived the right to challenge the statute's constitutionality.

B. This Appeal Does Not Present A Substantial Federal Question Because the Allocation Of The Burden Of Proving Truth In A Libel Action Is A Matter Of State Law, As The Pennsylvania Supreme Court Properly Held.

In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), this Court concluded that "the states should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of the private individual," 418 U.S. at 345-46, "so long as they do not impose liability without fault." Id., at 347. This conclusion reflected the very careful accommodation of two equally fundamental rights: the right to freedom of press, and the individual's interest in his own good name and reputation, the former being assured by the Federal Constitution, and the latter being reserved, under the Ninth and Tenth Amendments, primarily to the protection of the individual states. Id., at 340-41.

In so carefully crafted an opinion as Gertz, it is reasonable to assume that, if it was the Court's intention as a matter of constitutional law to shift to plaintiff the burden of proving falsity, that intention would have been explicitly stated because of the major effect such a shift would have on the accommodation of conflicting fundamental rights which was the whole purpose of the opinion. In fact, however, Gertz did not even mention the allocation of the burden of proving truth or falsity.

Defendants nonetheless argued below, and have submitted here, that Gertz sets out a constitutional mandate that a libel plaintiff has the burden of proving falsity because falsity is an element of fault. This argument is without merit. As the Pennsylvania Supreme Court noted, "[a]

plaintiff can demonstrate negligence in the manner in which the material was gathered, regardless of its truth or falsity." A-19, note 13. Those courts that have held to the contrary have either failed to recognize this simple fact or have decided, as a matter of state law, that a libel plaintiff should have the burden of proving falsity.

In accepting its responsibility to strike the appropriate balance between freedom of press and sanctity of individual reputation, the Pennsylvania Supreme Court concluded:

First, that falsity is an element of the cause of action of libel. A-7, note 2.

Second, in keeping with long-standing Pennsylvania precedents holding that, in both criminal and civil proceedings, the character or reputation of an individual is presumed to be good (A-4), falsity of

defamatory statements will be presumed, with the burden placed upon the alleged defamer to prove that the accusations are true. A-7, note 2.^{4/}

Third, in Pennsylvania in particular, the news media are privileged in civil

4/ This rule is further buttressed by Article 1, Section 1 of the Declaration of Rights to the Pennsylvania Constitution, which states:

Section 1. Inherent Rights of Mankind. All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Similarly, Section 11 of the Declaration of Rights provides:

...every man for any injury done him in his land, goods, person or reputation shall have remedy by due course of law....

(Emphasis added.)

libel actions to withhold the identity of their sources of information. 42 Pa. C.S.A. §5942(a). As a result, since a civil libel plaintiff is denied access to the sources of information upon which the defamatory statements are based, he would be unfairly restricted in his ability to prove falsity if that burden were to be placed upon him. The Pennsylvania Supreme Court properly viewed this as further justification for placing the burden of proving truth on a libel defendant. A-21 - A-22.^{5/}

5/ The issue of confidential sources, and the application of the Pennsylvania Shield Law, distinguishes this case factually from Wilson v. Scripps-Howard Broadcasting Company, 642 F.2d 371 (6th Cir.), cert. granted, 454 U.S. 962, cert. dismissed pursuant to Rule 53, 454 U.S. 1130 (1981).

The thoughtful opinion of the Pennsylvania Supreme Court reflects its understanding of Gertz, and its consideration of the history and unique circumstances of Pennsylvania constitutional, statutory, and decisional law.

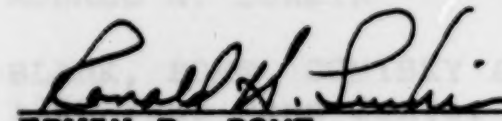
CONCLUSION

Defendants' appeal should be dismissed because the allocation of the burden of proving truth in a libel action is a matter of state, not federal, law.

Alternatively, the judgment of the Pennsylvania Supreme Court should be affirmed because that court correctly decided that Gertz v. Robert Welch, Inc. does not mandate that the burden of proving falsity in a libel action must be placed on plaintiff as a matter of federal constitutional law.

Finally, the appeal should be dismissed because defendants waived their right to contest the constitutionality of the state statute in question.

Respectfully submitted,



EDWIN P. ROME
RONALD H. SURKIN

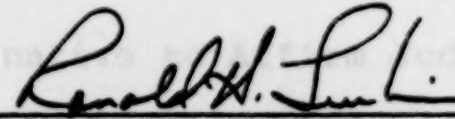
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Attorneys for Appellees

Date: April 11, 1985

**DISCLOSURE STATEMENT
PURSUANT TO RULE 28.1**

None of the corporate appellees has any parent, subsidiary or affiliated corporation.


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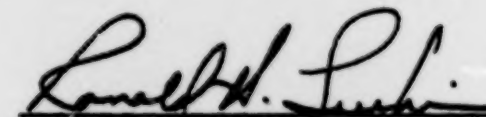
Date: April 11, 1985

CERTIFICATE OF SERVICE

RONALD H. SURKIN, a member of the Bar of the Supreme Court of the United States, hereby certifies that three copies of the attached Motion to Dismiss Appeal, or in the Alternative to Affirm Judgment were served by hand delivery on April 11, 1985 on counsel for appellants as follows:

David H. Marion, Esquire
Kohn, Savett, Marion & Graf, P.C.
2400 One Reading Center
1101 Market Street
Philadelphia, PA 19107

The foregoing individual is the only person required to be served.



RONALD H. SURKIN

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Attorneys for Appellees

Date: April 11, 1985

AUG 19 1985

JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1491

In the Supreme Court of the United States

OCTOBER TERM, 1984

PHILADELPHIA NEWSPAPERS, INC., *et al.*,

Appellants,

v.

MAURICE S. HEPPS, *et al.*,

Appellees.

On Appeal from the Judgment of the Supreme Court
of Pennsylvania

JOINT APPENDIX

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APPEAL DOCKETED MARCH 14, 1985
PROBABLE JURISDICTION NOTED JUNE 24, 1985

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JOINT APPENDIX

**DOCKET ENTRIES
COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA**

- | | |
|-----------------|---|
| 1 May 4, 1976: | Complaint filed. |
| 2 May 12, 1976: | Pltfs' Motion for Inspection of Documents pursuant to Pa. RCP 4009 filed. |
| 3 EoDie: | Court Order filed. Pltfs' Motion for Inspection of Documents is granted, and that Defts shall produce documents requested therein at the offices of Blank Rome, Klaus & Comisky within (20) days or Defts shall be precluded from entering a defense to the claim of the Pltfs and shall not be permitted to introduce evidence at time of Trial.
S/John M. Wajert, Judge. |

- 4 May 28, 1976: Defts Answer & New Matter filed.
- 5 June 1, 1976: Notice of Deposition upon Oral Examination of Wm. Ecenbarger & Wm. Lambert filed.
- 6 EoDie: Court Order filed. Order entered 5/12/76 is hereby vacated and the Defts granted until 6/22/76 in which to file an Answer to the Motion for Inspection of Documents. All proceedings to stay meanwhile. S/John M. Wajert, Judge.
- 7 June 2, 1976: Order of Appearance for Defts filed. S/ David H. Marion, Esq. and Richard L. Cantor, Esq.
- 8 June 7, 1976: Sheriff's Ret. Sheriff of Phila Co. deputized on 5/6/76. Served all Defts on 5/12/76 by serving Mr. Compton, person in charge of office.
- 9 June 21, 1976: Defts' Answer in opposition to Pltfs' Motion for Production of Documents and New Matter filed.
- 10 June 23, 1976: Pltfs' Reply & New Matter filed.
- 11 July 9, 1976: Notice of Deposition upon Oral Examination of Wm. Ecenbarger & Wm. Lambert filed.
- 12 Aug 3, 1976: This Case will be assigned to Judge Leonard Sugerman on Aug 4, 1976 for Desposition on Briefs.
- 13 Sept 27, 1976: Pltfs' 1st set of Interrogatories to Defts filed.
- 14 Oct 27, 1976: Defts' Answers and Objections to Pltfs' 1st set of Interrogatories filed.
- 15 Dec 20, 1976: Defts' Interrogatories to Pltfs filed.
- 16 EoDie: Motion for production of Documents filed.

- 17 EoDie: Court Order filed approving Motion. S/ John E. Stively, Jr., Judge.
- 18 Jan 25, 1977: Petition to vacate order and extend time for answering Motion for Inspection of Documents filed.
- 19 EoDie: Rule of Court filed. Rule ret. and Hearing set for Feb 4, 1977 @ (9.00 AM in Court Room #4. S. Leonard Sugerman, Judge.
- 20 Jan 31, 1977: Motion for Protective Order and extend time for answering Interrogatories filed.
- 21 EoDie: Rule of Court filed. Returnable 2/14/77 @ 9:00 AM in Court Room #4. S/ Leonard Sugerman, Judge.
- 22 Feb 16, 1977: Stipulation as to Court Order of 12/30/76 Answers, Depositions, etc (see papers).
- 23 EoDie: Approved by the Court. S/Leonard Sugerman, Judge.
- 24 Mar 16, 1977: Opinion filed.
- 25 EoDie: Court Order filed. (see papers) S/ Leonard Sugerman, Judge.
- 26 April 25, 1977: Answers of Wm. Pleva, Exec. of the Est. of Mary Holohan to Defts (1st set) Except #1, 2, 3, 4, 5, 10 & 11 filed.
- 27 EoDie: Answers of Railsplitter, Inc. T/A Brewer Outlet to Defts' Interrogatories (1st set) Except #1, 2, 3, 4, 5, 10 & 11 filed.
- 28 EoDie: Answers of Smulovitz Bros. Inc. T/A Brewers Outlet to Defts Interrogatories (1st set) Except #1, 2, 3, 4, 5, 10 & 11 filed.

- 29 EoDie: Answers to Factory Beer Outlet, Inc. T/A Brewers Outlet to Defts Interrogatories (1st set) Except #1, 2, 3, 4, 5, 10 & 11 filed.
- 30 EoDie: Answers of General Programming Inc. to Defts Interrogatories (1st set) Except #1, 2, 3, 4, 5, 10 & 11 filed.
- 31 EoDie: Answers of Maurice S. Hepps to Defts Interrogatories (1st set) Except #1, 2, 3, 4, 5, 10 & 11 filed.
- 32 EoDie: Answers of Pltf, Busy Bee Beverage Co., A, Germantown Soda & Bottle Co., Inc. T/A Brewers Outlet of Chestnut Hill; B, Pottstown Distributors T/A Brewers Outlet; C, Garrett Hill Beverage Co., T/A Brewers Outlet; D, Elemar, Inc., T/A Brewers Outlet; E, Almik Inc., T/A Brewers Outlet; F, Brookhaven Beverage Distributors, Inc.; G, Doral Inc., T/A Brewers Outlet, N.F.O. Inc., T/A Brewers Outlet; H, A David Fried Inc., T/A Brewers Outlet and; I, Lackawanna Beverage Distributors, T/A Brewers Outlet to Defts Interrogatories.
- 32 April 25, 1977: (1st set) Except #1, 2, 3, 4, 5, 10 & 11 filed.
- 33 April 26, 1977: Motion to Impound Answers to Interrogatories pursuant to paragraph #3 of the Stipulation and Order dated 2/16/77.
- 34 EoDie: Court Order filed approving Motion. S/Leonard Sugerman, Judge.
- 35 EoDie: Answers of Smulovitz Bros, Inc. T/A Brewers Outlet; A, Busy Bee Beverage

- Co. Inc. T/A Brewers Outlet; B, Germantown Soda & Bottle Co., Inc. T/A Brewers Outlet of Chestnut Hill; C, Pottstown Distributors T/A Brewers Outlet; D, A. David Fried, Inc. T/A Brewers Outlet; E, Garrett Hill Beverage Co. T/A Brewers Outlet; F, Elemar Inc. T/A Brewers Outlet; G, Lackawanna Beverage Distributors T/A Brewers Outlet; H, Brookhaven Beverage Distributors, Inc.; I, Factory Beer Outlet, Inc. T/A Brewers Outlet; J, Doral Inc. T/A Brewers Outlet; K, Almik, Inc. T/A Brewers Outlet; L, General Programming, Inc.; M, Maurice S. Hepps; N, N.F.O. Inc., T/A Brewers Outlet; O, Railsplitter, Inc. T/A Brewers Outlet; P, Wm. Pleva, Exec of Est. of Mary Holahan, to Defts Interrogatories (1st set) Except #1, 2, 3, 4, 5, 10 & 11 filed.
- 36 May 9, 1977: Praeipe to Amend Caption as to Pltf filed Changing — Brewers Outlet of Chestnut Hill to Germantown Soda & Bottle Inc., T/A Brewers Outlet of Chestnut Hill.
- 37 May 17, 1977: Praeipe filed directing the Prothy to mark the above Case discontinued as to Pltfs — Caro, Inc., Big Jacks, Inc., V. Bruno Jr., Inc., Landmar, Inc. and Nadbein, Inc. filed.
- EoDie: This Case is discontinued as to the above Pltfs by Doris M. Skiles, Deputy.
- 38 May 18, 1977: Notice of Oral Deposition of William Ecenbarger and William Lambert filed.
- 39 Aug 12, 1977: Notice of Oral Deposition of Frank Mazzei filed.

- 40 Sept 1, 1977: Notice of taking Deposition of Sidney Simon filed.
- 41 Feb 21, 1978: Deposition of Sidney A. Simon, Esq. filed.
- 42 EoDie: Pre-Oral examination of William Lambert filed.
- 43 EoDie: Pre-Oral examination of William E. Ecenbarger filed (3 vols).
- 44 EoDie: Original Depositions exhibits of Wm. Lambert, Wm. Ecenbarger, Sidney Simon filed.
- 45 Feb 24, 1978: Motion of William H. Lamb, Esq. to lift the impoundment order entered on 4/26/77 filed.
- 46 EoDie: Court Order filed. Answers to the Interrogatories which were subject of prior impoundment order of 4/26/77 are directed to be unsealed by Prothy and said impoundment order of 4/26/77 is vacated. S/Leonard Sugerman, Judge.
- 47 Aug 7, 1978: Defts Interrogatories to Pltf — Maurice Hepps (set #2) filed.
- 48 Sept 15, 1978: Answers of Maurice Hepps to Defts Interrogatories (set #2) filed.
- 49 Dec 29, 1978: Pltfs 2nd set of Interrogatories to Defts filed.
- 50 Jan 15, 1979: Defts' Objections to Pltfs 2nd set of Interrogatories filed.
- 51 Jan 22, 1979: Requests for Admissions filed.
- 52 Feb 6, 1979: Defts' Motion for extension of time to respond to Pltfs' requests for Admission filed.

- 53 EoDie: Court Order filed. Ordered that Defts shall have (30) days from date of this Order to respond. S/John M. Wajert, Judge.
- 54 Feb 9, 1979: Motion for Trial by Jury filed.
- 55 EoDie: Rule of Court filed. Rule returnable 2/28/79. S/John M. Wajert, Judge.
- 56 Feb 16, 1979: Demand of Jury Trial filed.
- 57 Feb 21, 1979: Pltfs' Answers to Defts' Motion for extension of time to respond to Pltfs requests for Admissions filed.
- 58 Feb 28, 1979: Defts; Answers and Opposition to Pltfs' Motion for Trial by Jury filed.
- 59 Mar 13, 1979: Defts' Answer to Pltfs' Request for Admissions filed.
- 60 EoDie: Defts Answers to Pltfs' 2nd set of Interrogatories filed.
- 61 June 1, 1979: Deposition of Maurice S. Hepps filed.
- 62 EoDie: Continued Deposition of Maurice S. Hepps filed.
- 63 EoDie: Oral Deposition of William Joseph Paulosky filed.
- 64 EoDie: Pltfs' Motion for partial Summary Judgment with respect to liability, or to deem certain facts to be established for purposes of trial filed.
- 65 EoDie: Rule of Court filed. Rule is entered on Defts to show cause why Pltfs' Motion for partial Summary Judgment with respect to liability or to determine certain facts to be established for purposes of trial should not be granted. Rule Ret. 6/11/79 S/Leonard Sugerman, Judge.

- 66 June 11, 1979: Defts' Answer to Pltfs' Motion for partial Summary Judgment with respect to liability or to deem certain facts to be established for purposes of trial filed.
- 67 June 27, 1979: Notice of deposition upon Oral Examination filed.
- 68 July 9, 1979: Defts' Interrogatories to Pltfs (set #3) filed.
- 69 EoDie: Defts Interrogatories to present the former Thrifty Beverage or Brewers Outlet stores not parties herein filed.
- 70 July 31, 1979: Answers to Defts Interrogatories to Pltfs' (set #3) filed.
- 71 EoDie: Objections to Defts' Interrogatories to Pltfs' (set #3) filed.
- 72 Aug 24, 1979: Court Order filed. AND NOW, upon consideration of the Memoranda of Counsel, the Pltfs' Motion for Trial by Jury is hereby granted. S/Leonard Sugerman, Judge.
- EoDie: Attys — Rome, Lamb, Cantor Marion, Roda, Surkin and Rovine notified.
- 73 Oct 26, 1979: Court Order filed. The Motion of the Board to quash a subpoena *Duces Tecum* served upon it by the Pltfs is in part denied and in part granted. The Board is hereby ordered and directed to produce for inspection and copying by the Pltfs all forms RCB-50 or similar forms, filed by all "D" Malt Beverage Distributors in Penna. during the years 1973-1978, inclusive, subject however, to the Provisions of 65 P.S. #66.3 and

- the limitations and conditions hereinafter set forth: (see Order). The said Motion to Quash is hereby granted. S/Leonard Sugerman, Judge.
- EoDie: Attys — Lamb, Rome, Surkin, Rovine, Cantor, Marion and Roda notified.
- 74 Nov 13, 1979: Defts' Motion to compel production of Pltfs' income tax returns.
- 75 Nov 13, 1979: Rule to show cause filed. Rule Ret. 11/28/79 S/Per Curiam.
- 76 Nov 28, 1979: Pltfs' Answer to Defts' Motion to compel production of Pltfs' income tax returns filed.
- 77 Dec 26, 1979: Pltfs' Answers to Defts' Interrogatories # 6 & 7 filed.
- 78 April 3, 1980: Court Order filed. AND NOW, it is hereby ordered and decreed that all Pltfs' other than Maurice Hepps and General Programming shall produce their Federal and State Income Tax returns for the years 1971 through the present time to counsel for Defts. It is further ordered and decreed that prior to such production, Pltfs shall cause to be placed the following legend, and it shall be the obligation of defense counsel to insure that access is thusly limited. S/Leonard Sugerman, Judge.
- 79 April 13, 1980: Court Order filed. It is ordered and decreed that all Pltfs except Maurice S. Hepps and General Programming, Inc. shall produce their Federal & State Income Tax refunds for the years 1971 thru present, filed. S/Leonard Sugerman, Judge.

- 80 May 13, 1980: Pltfs Supplemental Answers to Defts Interrogatories (set #3) filed.
- 81 Aug 5, 1980: Defts' Motion for Summary Judgment filed.
- 82/82A EoDie: Memorandum in Support of Defts Motion for Summary Judgment filed. (with appendisc Vol 122)
- 83 EoDie: Pltfs' Memorandum in Support of its Motion for partial Summary Judgment with respect to liability or to deem certain facts to be established for purposes of Trial.
- 84 Aug 25, 1980: Order to place Case on Arbitration List filed.
- 85 Jan 6, 1981: Supplemental Answers of Deft — Phila. Newspapers, Inc. to Pltfs' request for admissions filed.
- 86 EoDie: Defts' Supplemental reply Memorandum in support of Motions for Summary Judgment filed.
- 87 Jan 9, 1981: Supplemental Answers of Deft — Phila. Newspapers, Inc. to Pltfs request for admissions filed.
- 88 EoDie: Defts supplemental reply memorandum in support of Motion for Summary Judgment filed.
- 89 Feb 6, 1981: Court Order filed. AND NOW, upon consideration of the Pltfs Motion for partial summary judgment with respect to liability or in the alternative, to deem certain facts to be established for purposes of Trial, and the Defts Motion for Summary Judgment, together with the Pleadings, Deposition, Admissions,

supporting affidavits, Memoranda of Law and Oral Arguments, the Court Orders as follows (1) the Pltfs Motion for Partial Summary Judgment with respect to liability is hereby denied, (2) The Defts' Motion for Summary Judgment is hereby denied, (3) The Pltfs' Motion to deem certain facts to be established for purposes of Trial, filed pursuant to Pa. R.C.P. #1035(c) is denied except as follows; (a) The five newspaper articles which appeared in the Corporate Defts' Newspaper, The Phila. Inquirer on 5/5/75, 9/15/75, 1/16/76, 2/5/76 and 5/2/76, and all statements contained therein, were "published" by the said Corporate Deft to third persons, and shall be deemed so for purposes of Trial; the five said newspaper articles, and the statements contained therein, of which the Pltfs Complain, are capable of defamatory meaning with respect to the Pltfs(c) The Pltfs for the purpose of the within action are private and public figures, (d) as private figures the Pltfs must prove by a preponderance of the evidence, that the Defts were negligent in publishing the allegedly false states of which, the Pltfs complain in addition to proving the remaining elements of their action. S/Leonard Sugerman, Judge.

Feb 6, 1981:

Attys—Rome Lamb, Cantor, Marion, Roda, Surkin & Rovine notified.

90 Mar 23, 1981:

Plt's 2nd supplemental answers to Deft's interrogatories (third set).

**SUPREME COURT OF
PENNSYLVANIA**

2/23/83 Notice of Appeal Docketed.

10/25/83 Original record filed.

7/15/83 Appellants' Application for Advancement of Argument, filed.

7/28/83 Appellees' Answer and New Matter, filed.

8/15/83 ORDER: APPLICATION DENIED. BY THE COURT: s/SAMUEL J. ROBERTS, C.J., MR. JUSTICE McDERMOTT DID NOT PARTICIPATE IN THIS MATTER.

12/13/83 Appellees' Designation of Additions to Reproduced Record, filed.

3/22/84 Appellees' Motion for Disqualification of the Honorable Rolf R. Larsen and the Honorable James T. McDermott, filed.

4/9/84 ARGUED — J.66

4/19/84 ORDER: (Disqualification) DISMISSED AS MOOT. s/Nix, C.J.

12/14/84 **DECISION:** THE ORDER OF THE TRIAL COURT IS REVERSED AND A NEW TRIAL IS AWARDED. THE NEW TRIAL WILL BE CONFINED TO A DETERMINATION OF DEFENDANT'S LIABILITY AND THE ASSESS-

MENT OF COMPENSATORY DAMAGES IF THE LIABILITY ISSUE IS DECIDED IN FAVOR OF THE PLAINTIFF. NIX, C.J.

MR. JUSTICES LARSEN AND McDERMOTT DID NOT PARTICIPATE IN THE CONSIDERATION AND DECISION OF THIS CASE.

12/14/84

Judgment Entered

12/31/84

REMITTED.

3/14/85

Appellant's Notice of Appeal to Supreme Court of the United States, filed.

6/27/85

Certified copy of order of U.S. Supreme Court noting probable jurisdiction, filed.

COMPLAINT**COURT OF COMMON PLEAS***HEPPS et al. v. PHILADELPHIA NEWSPAPERS, INC. et al.*

[Formal Matter Omitted in Printing]

1. Plaintiff, Maurice Hepps ("Hepps"), is an individual residing at Johnny's Way, Westtown, Pennsylvania. Hepps was the president and chief executive officer of General Programming, Inc., and is currently its major stockholder.

2. Plaintiff, General Programming, Inc. ("GP") is a Pennsylvania business corporation with its principal place of business located at P.O. Box 137, Furnace Grove, Minersville, Pennsylvania, and is engaged in part in the real estate and franchising business in various counties in the Commonwealth of Pennsylvania. GP is the owner of the trademarks "Thrifty Beverage," and "Brewers' Outlet," which are utilized in connection with its franchising operation, and is and has been commonly known as "Thrifty," "Thrifty Beverage," the "Thrifty Chain" and "Brewers' Outlet."

3. All plaintiffs listed in the foregoing caption, other than Hepps and GP, are Pennsylvania corporations, or, in the case of William D. Pleva, a sole proprietorship, doing business as beer and soda distributorships at the addresses listed under their names in the caption. These plaintiffs are hereinafter referred to as "Store Owners." Each Store Owner has been doing business at its respective location since on or before May 5, 1975 under a management, licensing and consulting agreement with GP, thereby being known to the public throughout that period as part of the "Thrifty Chain."

4. Defendant Philadelphia Newspapers, Inc. ("PNI") is a corporation engaged in part in publishing the Philadelphia Inquirer ("Inquirer"), a daily morning newspaper with an approximate daily readership of 2,000,000 persons, residing predominantly in the Commonwealth of Pennsylvania, including Chester County, in the southern portion of the State of New Jersey, and the northern portion of the State of Delaware.

5. Defendants William Ecenbarger ("Ecenbarger") and William Lambert ("Lambert") are employed by PNI as reporters for the Inquirer.

COUNT I**PLAINTIFFS v. PNI AND ECENBARGER**

6. The allegations of paragraphs 1-5 are incorporated herein by reference.

7. On or about May 5, 1975, defendants PNI and Ecenbarger caused to be published in the Inquirer an article headlined "HOW MAZZEI USED PULL, KEPT BEER CHAIN INTACT," a copy of which is attached hereto, marked Exhibit "A", and made part hereof.

8. The article, and its headlines, state and imply that former State Senator Frank Mazzei, a convicted felon, and certain members of the "Cosa Nostra," had a hidden financial interest in plaintiffs' operations; that "the State Liquor Control Board ordered [the Thrifty chain] disbanded three years ago"; and that plaintiffs had used improper political influence to negate the effects of this decision.

9. The above statements and implications were false, and PNI and Ecenbarger either knew or should have known at the time of publication that they were false.

10. The above statements and implications constitute defamatory publications which are actionable per se, are libels per se, and were published with express malice.

11. Despite demand, PNI and Ecenbarger have failed and refused and continue to fail and refuse to retract their libellous and defamatory statements, with the exception of a single retraction, a copy of which is attached hereto, marked Exhibit "B", and made part hereof.

12. The above statements have severely injured plaintiff Hepps in that they have tended to (a) blacken his reputation; (b) expose him and him family to hatred, contempt, ridicule, and humiliation; (c) ascribe to him characteristics incompatible with the proper conduct of his business; and (d) injure him in the practice of his business.

13. Because of PNI's and Ecenbarger's malicious publication of the false and defamatory statements complained of herein, Hepps is entitled to recover from defendants, jointly and severally, such damages in excess of \$10,000.00 as will

compensate him for his actual financial loss, injury to his personal and business reputation, and for mental anguish, suffering and severe emotional distress; and which, in addition, will punish PNI and Ecenbarger for their malicious libels, and will deter them from repetition of similar libels in the future.

14. The above statements have severely injured each plaintiff other than Hepps in that they have tended to (a) blacken its reputation in the business community, including but not limited to its present and prospective institutional lenders, suppliers, and customers, and with the public in general; (b) ascribe to it characteristics of dishonesty and lack of integrity which are incompatible with the proper and profitable conduct of its business; and (c) injure it in the practice of its business.

15. Because of PNI's and Ecenbarger's malicious publication of the false and defamatory statements complained of herein, each plaintiff other than Hepps is entitled to recover from defendants, jointly and severally, such damages in excess of \$10,000.00 as will compensate it for its actual financial loss, loss of profits, and injury to its reputation; and which, in addition, will punish defendants for their malicious libels, and will deter them from repetition of similar libels in the future.

WHEREFORE, each plaintiff requests judgment against defendants PNI and Ecenbarger, jointly and severally, on Count I, for damages in excess of \$10,000.00, plus punitive damages and costs of suit.

COUNT II

PLAINTIFFS *v.* PNI AND ECENBARGER

16. The allegations of paragraphs 1-5 and 7-15 are incorporated herein by reference.

17. On or about September 15, 1975, defendants PNI and Ecenbarger caused to be published in the Inquirer an article headlined "WHILE SHAPP'S OFF CAMPAIGNING, INVESTIGATIONS HEAT UP AT HOME," a copy of which is attached hereto, marked Exhibit "C", and made part hereof.

18. The article states in part:

"Federal authorities are investigating the Thrifty Beverage chain of beer distributorships, which has won a series of competitive advantages through rulings by the State Liquor Control Board. The investigators have found connections between Thrifty and underworld figures. A major Thrifty backer is former State Sen. Frank Mazzei. . ." (emphasis added).

19. The underscored statements were false, and PNI and Ecenbarger either knew or should have known at the time of publication that they were false.

20. The underscored statements constitute defamatory publications which are actionable per se, are libels per se, and were published with express malice.

21. Despite demand, PNI and Ecenbarger have failed and refused and continue to fail and refuse to retract these libellous and defamatory statements.

22. The underscored statements have severely injured plaintiff Hepps in that they have tended to (a) blacken his reputation; (b) expose him and his family to hatred, contempt, ridicule, and humiliation; (c) ascribe to him characteristics incompatible with the proper conduct of his business; and (d) injure him in the practice of his business.

23. Because of PNI's and Ecenbarger's malicious publication of the false and defamatory statements complained of herein, Hepps is entitled to recover from defendants, jointly and severally, such damages in excess of \$10,000.00 as will compensate him for his actual financial loss, injury to his personal and business reputation, and for mental anguish, suffering and severe emotional distress; and which, in addition, will punish PNI and Ecenbarger for their malicious libels, and will deter them from repetition of similar libels in the future.

24. The underscored statements have severely injured each plaintiff other than Hepps in that they have tended to (a)

blacken its reputation in the business community, including but not limited to its present and prospective institutional lenders, suppliers, and customers, and with the public in general; (b) ascribe to it characteristics of dishonesty and lack of integrity which are incompatible with the proper and profitable conduct of its business; and (c) injure it in the practice of its business.

25. Because of PNI's and Ecenbarger's malicious publication of the false and defamatory statements complained of herein, each plaintiff other than Hepps is entitled to recover from defendants, jointly and severally, such damages in excess of \$10,000.00 as will compensate it for its actual financial loss, loss of profits, and injury to its reputation; and which, in addition, will punish defendants for their malicious libels, and will deter them from repetition of similar libels in the future.

WHEREFORE, each plaintiff requests judgment against defendants PNI and Ecenbarger, jointly and severally, on Count II, for damages in excess of \$10,000.00, plus punitive damages and costs of suit.

COUNT III

PLAINTIFFS *v.* PNI, ECENBARGER AND LAMBERT

26. The allegations of paragraphs 1-5, 7-15, and 17-25 are incorporated herein by reference.

27. On or about January 16, 1976, defendants caused to be published in the Inquirer an article headlined "BEER CHAIN PROBED FOR MAFIA TIE," a copy of which is attached hereto, marked Exhibit "D", and made part hereof.

28. The article states and implies that plaintiffs had used improper political influence to negate the effects of a court ruling allegedly ordering the Thrifty chain disbanded, and that they had ties to the Mafia.

29. The above statements and implications were false, and defendants either knew or should have known at the time of publication that they were false.

30. The above statements and implications constitute defamatory publications which are actionable per se, are libels per se, and were published with express malice.

31. Despite demand, defendants have failed and refused and continue to fail and refuse to retract their libellous and defamatory statements.

32. The above statements have severely injured plaintiff Hepps in that they have tended to (a) blacken his reputation; (b) expose him and his family to hatred, contempt, ridicule, and humiliation; (c) ascribe to him characteristics incompatible with the proper conduct of his business; and (d) injure him in the practice of his business.

33. Because of defendants' malicious publication of the false and defamatory statements complained of herein, Hepps is entitled to recover from defendants, jointly and severally, such damages in excess of \$10,000.00 as will compensate him for his actual financial loss, injury to his personal and business reputation, and for mental anguish, suffering and severe emotional distress; and which, in addition, will punish defendants for their malicious libels, and will deter them from repetition of similar libels in the future.

34. The above statements have severely injured each plaintiff other than Hepps in that they have tended to (a) blacken its reputation in the business community, including but not limited to its present and prospective institutional lenders, suppliers, and customers, and with the public in general; (b) ascribe to it characteristics of dishonesty and a lack of integrity which are incompatible with the proper and profitable conduct of its business; and (c) injure it in the practice of its business.

35. Because of defendants' malicious publication of the false and defamatory statements complained of herein, each plaintiff other than Hepps is entitled to recover from defendants, jointly and severally, such damages in excess of \$10,000.00 as will compensate it for its actual financial loss, loss of profits, and injury to its reputation; and which, in addition, will punish defendants for their malicious libels, and will deter them from repetition of similar libels in the future.

WHEREFORE, each plaintiff requests judgment against defendants, jointly and severally, on Count III, for damages in excess of \$10,000.00, plus punitive damages and costs of suit.

COUNT IV**PLAINTIFFS v. PNI AND ECENBARGER**

36. The allegations of paragraphs 1-5, 7-15, 17-25 and 27-35 are incorporated herein by reference.

37. On or about February 5, 1976, PNI and Ecenbarger caused to be published in the Inquirer an article headlined "INSURER, CRIME LINK PROBED BY U.S. JURY," a copy of which is attached hereto, marked Exhibit "E", and made part hereof.

38. The article states in part:

"Federal agents have evidence of direct financial involvement in Thrifty by [Joseph] Scalleat [a leader in organized crime], and Scalleat's nephew is involved in a Thrifty distributorship.

"... former State Senator Frank Mazzei, who was a behind-the-scene Thrifty backer. ...

"The Thrifty chain ... has survived because several favorable decisions by the liquor board.

"The Pennsylvania Securities Commission is investigating the transfer of Thrifty stock to Hulse. The transfer occurred despite a 1969 commission rejection of Thrifty's request to sell stock publicly."

39. These statements were false and PNI and Ecenbarger either knew or should have known at the time of publication that they were false.

40. These statements constitute defamatory publications which are actionable per se, are libels per se, and were published with express malice.

41. Despite demand, PNI and Ecenbarger have failed and refused and continue to fail and refuse to retract these libellous and defamatory statements.

42. These statements have severely injured plaintiff Hepps in that they have tended to (a) blacken his reputation;

(b) expose him and his family to hatred, contempt, ridicule, and humiliation; (c) ascribe to him characteristics incompatible with the proper conduct of his business; and (d) injure him in the practice of his business.

43. Because of PNI's and Ecenbarger's malicious publication of the false and defamatory statements complained of herein, Hepps is entitled to recover from defendants, jointly and severally, such damages in excess of \$10,000.00 as will compensate him for his actual financial loss, injury to his personal and business reputation, and for mental anguish, suffering and severe emotional distress; and which, in addition, will punish PNI and Ecenbarger for their malicious libels, and will deter them from repetition of similar libels in the future.

44. These statements have severely injured each plaintiff other than Hepps in that they have tended to (a) blacken its reputation in the business community, including but not limited to its present and prospective institutional lenders, suppliers, and customers, and with the public in general; (b) ascribe to it characteristics of dishonesty and lack of integrity which are incompatible with the proper and profitable conduct of its business; and (c) injure it in the practice of its business.

45. Because of PNI's and Ecenbarger's malicious publication of the false and defamatory statements complained of herein, each plaintiff other than Hepps is entitled to recover from defendants, jointly and severally, such damages in excess of \$10,000.00 as will compensate it for its actual financial loss, loss of profits, and injury to its reputation; and which, in addition, will punish defendants for their malicious libels, and will deter them from repetition of similar libels in the future.

WHEREFORE, each plaintiff requests judgment against defendants PNI and Ecenbarger, jointly and severally, on Count IV, for damages in excess of \$10,000.00, plus punitive damages and costs of suit.

COUNT V
PLAINTIFFS v. PNI AND LAMBERT

46. The allegations of paragraphs 1-5, 7-15, 17-25, 27-35 and 37-45 are incorporated herein by reference.

47. On or about May 2, 1976, PNI and Lambert caused to be published in the Inquirer an article headlined "HOW STATE OFFICIALS TOYED WITH INSURANCE FIRM," a copy of which is attached hereto, marked Exhibit "F," and made part hereof.

48. The article states in part:

"Wisconsin Surety had been linked to the Thrifty Beverage beer chain, which in turn had connections itself with organized crime."

49. These statements were false and PNI and Lambert either knew or should have known at the time of publication that they were false.

50. These statements constitute defamatory publications which are actionable per se, are libels per se, and were published with express malice.

51. Despite demand, PNI and Lambert have failed and refused and continue to fail and refuse to retract these libellous and defamatory statements.

52. These statements have severely injured plaintiff Hepps in that they have tended to (a) blacken his reputation; (b) expose him and his family to hatred, contempt, ridicule, and humiliation; (c) ascribe to him characteristics incompatible with the proper conduct of his business; and (d) injure him in the practice of his business.

53. Because of PNI's and Lambert's malicious publication of the false and defamatory statements complained of herein, Hepps is entitled to recover from defendants, jointly and severally, such damages in excess of \$10,000.00 as will compensate him for his actual financial loss, injury to his personal and business reputation, and for mental anguish, suffering and severe emotional distress; and which, in addition, will punish PNI and Lambert for their malicious libels, and will deter them from repetition of similar libels in the future.

54. These statements have severely injured each plaintiff other than Hepps in that they have tended to (a) blacken its reputation in the business community, including but not limited to its present and prospective institutional lenders, suppliers, and customers, and with the public in general; (b) ascribe to it characteristics of dishonesty and lack of integrity which are incompatible with the proper and profitable conduct of its business; and (c) injure it in the practice of its business.

55. Because of PNI's and Lambert's malicious publication of the false and defamatory statements complained of herein, each plaintiff other than Hepps is entitled to recover from defendants, jointly and severally, such damages in excess of \$10,000.00 as will compensate it for its actual financial loss, loss of profits, and injury to its reputation; and which in addition, will punish defendants for their malicious libels, and will deter them from repetition of similar libels in the future.

WHEREFORE, each plaintiff requests judgment against defendants PNI and Lambert, jointly and severally, on Count V, for damages in excess of \$10,000.00, plus punitive damages and costs of suit.

[Subscriptions and Exhibits omitted in printing]

**DEFENDANT'S ANSWER AND NEW MATTER
COURT OF COMMON PLEAS**

[Caption omitted in printing]

Defendants Philadelphia Newspapers, Inc., William Ecenbarger and William Lambert are advised that no responsive pleading is required to the averments of plaintiffs' Complaint and that said averments are deemed at issue and denied pursuant to Pa. R.C.P. 1045(a), except it is admitted that defendant Philadelphia Newspapers, Inc. ("PNI") is a corporation engaged in part in publishing *The Philadelphia Inquirer*, and that defendants Ecenbarger and Lambert are employed by PNI as reporters for *The Inquirer*, but it is denied that defendants Ecenbarger and Lambert caused to be published the articles complained of in paragraphs 7, 17, 27, 37 and 47 of plaintiffs' Complaint, and to the contrary it is averred that the articles referred to in the aforesaid paragraphs were published by defendant PNI.

New Matter

16. The Complaint fails to state a claim upon which relief can be granted.

17. The publications complained of are protected speech and privileged under the First and Fourteenth Amendments to the Constitution of the United States and under the Constitution and laws of the Commonwealth of Pennsylvania.

18. The publications complained of constituted fair and accurate reports of the activities and conduct of public officials and public figures, and accordingly are constitutionally privileged under the standard set forth in *NEW YORK TIMES CO. v. SULLIVAN*, 376 U.S. 255 (1964).

19. The publications complained of constituted fair and accurate reports of judicial, administrative and governmental activities and proceedings, and accordingly are privileged.

20. The publications complained of reported highly newsworthy matters and events of legitimate and substantial public interest and concern, and were reasonable and justified.

21. The publications complained of reported matters of public record and accordingly are privileged.

22. The publications complained of were written and published based upon reliable sources, in good faith, without malice, on proper occasion and with proper motives, in the belief that the facts set forth therein were true and without any reason to doubt their truth.

WHEREFORE, defendants Philadelphia Newspapers, Inc., William Ecenbarger and William Lambert pray that the Complaint be dismissed at the cost of plaintiffs.

[Subscriptions omitted in printing]

**REPLY TO NEW MATTER
COURT OF COMMON PLEAS**

[Caption omitted in printing]

16-21. The allegations of these paragraphs constitute conclusions of law to which no responsive pleadings are required.

22. Denied. It is denied that defendants had no reason to doubt the truth of the publications complained of in the Complaint. On the contrary, defendants knew or had reason to know that the publications complained of were false. As to the remaining averments of this paragraph, after reasonable investigation, plaintiffs are without knowledge or information sufficient to form a belief as to the truth thereof, and they are therefore denied. Strict proof is demanded at trial, if material.

[Subscriptions omitted in printing]

OPINION

COURT OF COMMON PLEAS CHESTER COUNTY, PENNSYLVANIA *HEPPS v. PHILADELPHIA NEWSPAPERS, INC.*

SUGERMAN, J., March 16, 1977—The case before us requires a response to a novel and important question: May a plaintiff in a libel action against a newspaper obtain pretrial discovery of notes made by a reporter while interviewing informants in the course of preparation of a series of news articles thereafter published and allegedly libelous? The question presents an issue of first impression in Pennsylvania.

From the complaint we observe that Maurice Hepps, the individual plaintiff, is the principal stockholder of the corporate plaintiff, General Programming, Inc. ("General"). The latter entity owns the trademarks "Thrifty Beverage" and "Brewer's Outlet," and licenses such marks, and provides management and consultation services to licensees. The remaining corporate and individual plaintiffs ("Thrifty Beverage"), some 19 in number, are allegedly licensees of General and engaged in the business of distributing beer and soda in Pennsylvania.

The corporate defendant, Philadelphia Newspapers, Inc. ("PNI"), publishes the Philadelphia Inquirer, a newspaper of general circulation¹ in the Delaware Valley. The individual defendants, William Ecenbarger ("Ecenbarger"), and William Lambert ("Lambert"), are employed by PNI as news reporters.

In their capacity as reporters, Ecenbarger and Lambert prepared a series of articles, later published in the Inquirer, concerning Hepps, General and Thrifty Beverage. The articles endeavor to connect Hepps, General and Thrifty Beverage to certain named "underworld" figures, and organized crime in general. As one such example, in an article published in the Inquirer on May 5, 1975, under the byline of Ecenbarger and bearing the headline: "HOW MAZZEI USED PULL, KEPT BEER CHAIN INTACT," the reporter asserts

1. Act of May 16, 1929, P.L. 1784, sec. 3, as amended, 45 P.S. §3(4).

that former State Senator Frank Mazzei, described variously as a convicted felon and an extortionist, used improper influence or "political muscle" to subvert a ruling of the Pennsylvania Liquor Control Board. The article further asserts that while there is no visible financial link between Mazzei and Thrifty Beverage, "... there is a clear pattern of interference in state government by Mazzei on behalf of Hepps and Thrifty." Finally, in the same article, Ecenbarger reports that "Mazzei has several underworld associates, one of which is Joseph Scalleat of Hazleton, who is described by the State Crime Commission as a Cosa Nostra leader..." and that "... Scalleat's wife² is a licensed Thrifty distributor in Bucks County."

Alleging the libelous character of such articles, the individual and corporate plaintiffs filed their complaint in trespass against defendants on May 4, 1976.³

On May 12, 1976, plaintiffs moved for inspection of documents pursuant to Pa. R.C.P. 4009. On the same day, the court, by the Honorable John M. Wajert, ordered defendants to produce the requested documents for inspection by plaintiffs, but vacated its order on June 1, 1976, so as to permit defendants to file an answer to plaintiffs' motion for inspection. Such answer was filed on June 21, 1976, and admitted possession of the requested documents, but asserted that the same were irrelevant to plaintiffs' cause, plaintiffs' request was made in bad faith, and production would be burdensome and oppressive to defendants. In new matter, defendants claim the news reporter's statutory privilege as to those documents that might suggest or reveal the "sources of defendants' articles."

Although not required to do so, defendants thereafter answered plaintiffs' complaint, admitting the employment of

2. Later corrected by the Inquirer to read "sister-in-law." See Exhibit B to plaintiffs' complaint.

3. A corporation may, of course, recover in an action grounded on defamation: *Cosgrove Studio & Camera Shop v. Pane*, 408 Pa. 314, 182 A.2d 751 (1962).

Ecenbarger and Lambert by PNI, and the publication of PNI of the allegedly offending articles. In new matter, defendants assert a series of defenses to plaintiffs' libel action, including truth, fair and accurate reporting on the conduct of public officials and public figures, and publication in good faith, without malice, based upon reliable sources. Plaintiffs replied to the new matter, denying the factual allegations contained therein.

ISSUES

As later refined and narrowed by the parties, plaintiffs' motion for production of documents seeks discovery of notes and memoranda made by reporters Ecenbarger and Lambert in the course of interviews conducted while preparing the articles ultimately published by the *Inquirer*. Defendants have refused to produce such materials, contending that the same will reveal confidential sources or may lead to the discovery or revelation of such sources, and that such materials are, therefore, privileged under the Pennsylvania statute according newsmen the privilege of nondisclosure of sources of information, and thus not a proper subject of discovery as provided in Pa. R.C.P. 4011(c).

Plaintiffs' motion for production also demands inspection of "[a]ll documents [in the possession or control of defendants] concerning the performance of either individual defendant in the course of his employment with the Philadelphia Newspapers, Inc."

Defendants refuse to produce such documents on the several bases that such records are irrelevant to plaintiffs' cause, are "confidential and highly personal records," and plaintiffs' request is designed to "harass and annoy" defendants.

Lastly, plaintiffs' motion seeks production of "all articles published in The Philadelphia *Inquirer* authored [sic] by William Ecenbarger or William Lambert, either individually or jointly with any other person." Defendants refuse plaintiffs' latter request, as well, contending that such articles are, again, irrelevant to plaintiffs' cause, and that the request is

made in bad faith with the intent to require an unreasonable investigation and cause unreasonable annoyance, expense and oppression. We treat the issues so defined seriatim.

(1) *Reporters' Notes*

We consider first the more difficult issue before us, and the matter most vigorously and ably argued by the parties.

Following argument but prior to submission of the instant motion for decision, defendants responded to plaintiffs' first set of interrogatories and in their answers, defendants disclosed the identity of 15 sources of information. As a result, although plaintiffs' requests for production are broadly phrased,⁴ the parties have narrowed and limited the issue for decision to the matter of the production of notes made by defendant reporters in the course of interviews with various informants while preparing the allegedly libelous articles for publication. The parties agree that the notes are of two classes: (1) Notes of interviews with disclosed informants which do not reveal and cannot lead to the revelation of the identity of confidential informants, and (2) notes of interviews with both disclosed and confidential informants which either reveal, or might lead to the revelation of, the identity of confidential informants.

Defendants resist production of notes of both classes on four grounds: (1) The notes are protected from discovery, or "privileged" under the First Amendment to the Constitution of the United States; (2) plaintiffs' motion is premature; (3) the notes are protected from discovery under a "thought process privilege," available to news editors and presumably investigative reporters; and (4) the notes are protected from discovery under the privilege accorded news media personnel by the Pennsylvania statute permitting the nondisclosure of sources of information. In view of our disposition, we need treat only the last of these.

As Professor Wigmore has observed, the mere fact that a communication between a journalist and an informant was

4. See plaintiffs' motion for production, pars. 1-5, 7, 8.

made in express confidence, or in the implied confidence of a confidential relation does not create a privilege of non-disclosure at common law: 8 Wigmore §2286 (McNaughton rev. 1961):

"This common law rule is not questioned today. No pledge of privacy nor oath of secrecy can avail against demand for truth in a court of justice. Accordingly, in the absence of a statute to the contrary, a confidential communication . . . to a . . . journalist . . . is not privileged from disclosure." *Id.* at 528, 529, 530.

Nor does it appear that there is an absolute constitutional testimonial privilege permitting nondisclosure of sources accorded to news reporters under the First Amendment or the Constitution of Pennsylvania. See, for example: *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed. 2d 626 (1972) (grand jury proceedings); *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910, 79 S. Ct. 237, 3 L.Ed. 2d 231 (1958) (libel action); *Taylor and Selby Appeals*, 412 Pa. 32, 40, 193 A.2d 181, 184 (1963).

As a consequence, the legislature of Pennsylvania created a testimonial privilege permitting news reporters and other media personnel to refuse to disclose sources of information.⁵ It is this statute upon which defendants rely in their refusal to produce reporters' notes.

The privilege of nondisclosure was created by the Act of June 25, 1937, P.L. 2123, sec. 1, as amended December 1, 1959, P.L. 1669, sec. 1, and July 31, 1968, P.L. 858, sec. 1, 28 P.S. §330, and it provides, in pertinent part:

"No person, engaged on, connected with, or employed by any newspaper of general circulation as defined by the laws of this Commonwealth, or any press association or any radio or television station, or any magazine of general circulation, for

5. The legislature has statutorily extended the privilege of non-disclosure to communications between spouses (28 P.S. §316); attorney and client (28 P.S. §321); physician and patient (28 P.S. §328); clergyman and penitent (28 P.S. §331); and accountant and client, Act of May 26, 1947, P.L. 318, as amended, 63 P.S. §9.11(a).

the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any court, grand jury, traverse or petit jury, or any officer thereof, before the General Assembly or any committee thereof, before any commission, department, or bureau of this Commonwealth, or before any county or municipal body, officer, or committee thereof."

The statute and its scope have been construed and interpreted in only one appellate decision in Pennsylvania: *Taylor supra*, before the Supreme Court of Pennsylvania as the result of orders of a lower court adjudging Robert L. Taylor, General Manager of the Evening and Sunday Bulletin, and Earl Selby, City Editor of the same publication, in contempt. Because of the importance of the decision to our task, we set out the facts at length.

In preparation for an investigating grand jury, to be convened in November 1962 for the purpose of investigating corruption in city government, an assistant district attorney of Philadelphia, in February 1962, interviewed one John Fitzpatrick.

On December 30, 1962, the Bulletin published an article entitled "Fitzpatrick's Secret Talk to D. A. is Bared." The article consisted principally of questions put to and answers made by Fitzpatrick at the February interview with the assistant district attorney. The article also referred to the end of the interview when the assistant district attorney said that he would review the record for further questions, and the article then added: "*However, much of the subsequent questioning dealt with what John Fitzpatrick had told Bulletin reporters.*"

In January, 1963, a subpoena duces tecum was served upon Taylor and Selby, directing them to appear before the investigating grand jury and bring with them:

"(a) 'All tape recordings, written statements, Memoranda of interviews, conversations, conferences had with John J. Fitzpatrick'; and (b) 'All copies of statements given by John J. Fitzpatrick to the District Attorney [footnote omitted] on Feb-

ruary 20, 1962, portions of which appeared in the Philadelphia Evening Bulletin on December 30, 1962; and (a) 'all tape recordings of conferences, interviews, discussions, interrogations or conversations with John Fitzpatrick'; (b) 'all memorandum, notes, reports and other documents of or pertaining to conferences, interviews, discussions, interrogations or conversations with John Fitzpatrick'; (c) 'all memorandum, notes, reports and other documents of or pertaining to investigations conducted as a result of information furnished by John Fitzpatrick'; (d) 'all records of expenses incurred directly or indirectly in gathering information from, or conducting conferences, investigations, discussions, interrogations or conversations with John Fitzpatrick'; (e) 'all documents of or pertaining to the examination of John Fitzpatrick by polygraph, examiners, physicians, psychologists or other experts'; and (f) 'any and all other documents of or pertaining to John Fitzpatrick'." Id. at 35, 193 A.2d at 182.

Taylor and Selby appeared before the grand jury but refused to answer certain questions and refused to produce the materials requested by the subpoena, claiming the statutory privilege as the basis for such refusal. When brought before the lower court, Taylor and Selby again refused to answer the questions or produce the materials and were thereupon adjudged in contempt, the court holding that the Act of 1937 protects a newsman only against the compulsory disclosure of the identity of *persons* and does not protect against the compulsory disclosure of documents or other inanimate materials. In its order, the lower court also held:

"(1) that appellants were *not* required to produce an alleged copy of statements made by John Fitzpatrick to the District Attorney's office on February 20, 1962 and set forth in part in The Bulletin on December 30, 1962, since, inter alia, the result might be to disclose the identity of the transmitter of the alleged copy to The Bulletin; (2) that appellants were *not* required to produce memoranda, notes, reports and other documents of or pertaining to investigations conducted by The Bulletin as a result of information furnished by John Fitzpatrick, since such investigations, made on leads fur-

nished by Fitzpatrick, would doubtless encompass confidential interviews with other persons who would give information only if their identity were kept secret; (3) that appellants were *not* required to produce the results of alleged polygraph (lie-detector) tests given to Fitzpatrick since, inter alia, this would reveal the identity of the experts who conducted such tests; *but* (4) *that appellants were required to produce documents and tape recordings allegedly evidencing what John J. Fitzpatrick had told Bulletin reporters, ...*" Id. at 37-8, 193 A.2d at 183. (Emphasis in original and supplied).

The lower court directed Taylor and Selby to produce the documents and tape recordings of Fitzpatrick's interview with Bulletin reporters, as, in its view, the Bulletin had waived the privilege created by the statute by publishing the single sentence quoted, supra: "However, much of the subsequent questioning dealt with what John Fitzpatrick had told Bulletin reporters." The lower court also directed Taylor and Selby to answer certain questions concerning such material.

Taylor and Selby appealed the orders adjudging them in contempt, and as the issues were framed in the Supreme Court, the questions to be answered on appeal were (1) whether Taylor and Selby, without regard to waiver, might have properly exercised the statutory privilege in refusing to produce documents and tape recordings prepared by them evidencing the statements Fitzpatrick made to them, and (2) if they might properly have exercised the privilege, had they nevertheless waived it by publishing the single sentence quoted above?

In an opinion representing the views of six of the seven members of the court, Chief Justice Bell reversed the orders of contempt and at the same time held (1) the word "source" means not only the identity of persons, but also includes documents, inanimate objects and all sources of information; (2) while a news reporter may indeed waive the privilege granted by the act, such waiver extends only to statements of an informant actually published, and the statute must be liberally construed in favor of the news media.

The two-pronged holding of Taylor, when considered in the context of the facts upon which it was based, may be narrowly stated thusly: The word "source," used in the phrase "source of any information" as it appears in the statute, includes, in addition to the identity of persons who are sources of information, all other sources of information as well, and although the privilege accorded by the statute may be waived, the extent of a waiver is limited to that portion of the source's statement as is actually published.

Plaintiffs here might argue, but wisely decline, that there is a substantive distinction between tapes and documents containing the statements of an animate source, as actually verbalized by such person,⁶ and notes and memoranda prepared by a reporter in the course of interviewing an animate source. Certainly, there is some logic in the suggestion that notes made by a reporter during the course of an interview with a disclosed informant, and particularly notes that admittedly do not reveal the identity of undisclosed informants, are not "sources" under the Taylor definition.⁷ This suggestion simply equates the word "source" with the word "origin," and adds that even if Taylor permits the nondisclosure of unpublished portions of a disclosed informant's statements, such other information contained in the notes which, by admission, does not reveal the identity of confidential informants, animate or inanimate, is not privileged.

However, we do not read Taylor so narrowly. In the first instance, as the court there noted:

"If a Court can select or direct newsmen ... to select or delete what information is disclosed by the informer ... the

6. Although there is no indication in Taylor that documents "allegedly evidencing what John J. Fitzpatrick had told Bulletin reporters" as ordered to be produced by the lower court contained only the words of Fitzpatrick.

7. One can cite examples of documents more validly characterized as sources than are reporter's notes. For example, the files surreptitiously photographed during the burglary of the office of Dr. Ellsberg's psychiatrist clearly fit the Taylor definition as an inanimate or documentary source. The notes made by a reporter while examining those files would appear to present an issue similar to ours.

object and the intent of the Act will be *realistically* nullified." Id. at 43-4, 193 A.2d at 186. (Emphasis in original).

The court appeared to be concerned that the revelation of the questions and answers contained in the undisclosed portion of the Fitzpatrick interview might have also revealed the identity of other sources. Id. at 43-4, 193 A.2d at 186.

Secondly, we must view plaintiffs' request at bar with the precept in mind that Taylor requires a broad and liberal construction of the act, in favor of nondisclosure.

Thirdly, and most obviously, Taylor holds that regardless of the reason, a reporter need not disclose those portions of an informant's statement, whether or not the identity of the informant is disclosed. It is fair to assume that the notes and memoranda prepared by defendants Ecenbarger and Lambert in the course of interviews with informants contain such statements.

It must also be noted that if we apply the principle of statutory construction enunciated in Taylor, *all* notes made by reporters relating to the subjects of articles, regardless of the nature of the contents, are privileged and need not be disclosed or produced. To hold otherwise might well require that we select or delete, or direct newsmen to select or delete, information contained in such notes, the very act on our part effectively prohibited by Taylor.

To hold otherwise would also require a strict and narrow interpretation of the act, directly contrary to the liberal and broad interpretation mandated by Taylor.

Plaintiffs, in recognition of at least the facial authority of Taylor, and the scope of the privilege accorded by the act as apparently including the instant notes, argue that, although the notes here sought may be privileged in another setting, defendants by pleading the defenses of good faith and reliability of source have thereby waived the privilege of nondisclosure of sources. How, ask plaintiffs, rhetorically, can defendants assert as a defense that the sources upon which they relied were reliable, and, at the same time, refuse to reveal the identity of such sources, with the result that reliabil-

ity or the lack of reliability can never be determined by a fact finder.⁸

While Taylor does not answer the specific question, it does offer some direction. Our interpretation of the holding leads us inevitably to conclude that the privilege as described in Taylor is well nigh absolute and is not waived by the act of pleading the defenses of reliability or good faith. Such an interpretation accords with the broad and liberal construction of the act as required by Taylor.

It may also be argued, although plaintiffs do not, that in Taylor, the court narrowly construed a waiver because of its concern that the identity of undisclosed sources might well have been revealed had the unpublished portion of Fitzpatrick's statement been disclosed: "Judge Kelley based his ruling principally if not solely on his conclusion that the Bulletin had waived the privilege created by the Act of 1937 by publishing in its aforesaid article on December 30, 1962, the single sentence hereinabove quoted: 'However, much of the subsequent questioning dealt with what John Fitzpatrick had told Bulletin reporters.' *This obviously gave Fitzpatrick as the leading source, but the identity of many other persons may have been revealed in the questions and/or the answers.*" Id. at 43, 193 A.2d at 186. (Emphasis supplied.)

Such concern appears to be at the core of the court's view on the subject of waiver. However, in the face of the clear and succinct holding that follows expression of the court's concern: "We therefore hold that a waiver by a newsman applies only to the statements made by the informer which are actually published or publicly disclosed [footnote omitted] and not to other statements made by the informer to the newspaper." Id. at 44, 193 A.2d at 186, we must assume that the limitation on waiver so expressed applies to unpublished statements regardless of whether other sources might be revealed.

In the alternative, plaintiffs argue that if the privilege fa-

8. The question, of course, as posed by plaintiffs also focuses upon the historically competing interests of a free press on the one hand and redress for defamation on the other.

cially applies to the notes at bar, and we find no waiver, then this court should carve an exception into the act in the case of libel actions. Unless we do, plaintiffs contend, the act becomes a sword, rather than a shield, to be wielded by and at the whim of unscrupulous newsmen against defamed plaintiffs.

We respond by noting the act itself admits of no exceptions. Were we to create one, we would thereby engraft language onto the act not now apparent. This we may and will not do. Nor does Taylor admit of such an exception. Again, Taylor, at least to us, establishes the privilege against disclosure as absolute. If indeed an exception is to be carved, the blade should be wielded by the tribunal that espoused the principle, and not the trial court.

Plaintiffs argue, to the contrary, that (1) Taylor concerned a grand jury proceeding and not a libel action, and should not, therefore, be applied at bar, as the two proceedings present entirely different considerations; (2) the information sought by plaintiffs goes to the "heart" of their case and should, therefore, be disclosed; and (3) the legislative purpose of the statute creating the privilege would not be served by permitting defendants to avail themselves of its benefits in a libel action.

All such arguments find some support in the cases cited by plaintiffs, and we examine them in moderate detail, discussing plaintiffs' arguments as we do.

Plaintiffs first direct us to three decisions of the appellate courts of New Jersey. In the earliest of these, *State v. Donovan*, 129 N.J.L. 478, 30 A.2d 421 (1943), several public officials contended that indictments returned against them by a grand jury were politically motivated. The Supreme Court of New Jersey appointed a commissioner to investigate the allegation, and in the course of the investigation, the county prosecutor called before the commissioner editors of several Hudson County newspapers who were questioned by the commissioner. One of the questions posed to the editors asked the name of the person who conveyed certain press releases to the editors, the newspapers having published the press releases and the names of the persons who had prepared them. The editors declined to reveal the name of the "conduit," as-

serting the statutory privilege accorded newsmen in New Jersey. The statute, similar to the Pennsylvania statute, provided:

"No person engaged in, connected with or employed on any newspaper shall be compelled to disclose, in any legal proceeding or trial, before any court, before any grand jury of any county or any petit jury of any court, before the presiding officer of any tribunal or his agent, or before any committee of the legislature, or elsewhere, *the source of any information* procured or obtained by him and published in the newspaper on which he is engaged, connected with or employed." N.J.S.A. 2: 97-11, as cited in 129 N.J.L. 485. (Emphasis supplied.)

The Supreme Court of New Jersey, in its disposition, noted first that under the law of New Jersey, statutes in derogation of the common law are to be *strictly* construed, and New Jersey courts are not to infer that the legislature intended to alter the common law further than the case requires.

So saying, the court, construing the word "source" as used in the statute strictly, ordered the editors to reveal the name of the conduit through whom the press releases had passed, as such person was not a "source" of information, but merely the messenger who communicated the press releases from the source to the newspaper.

"We conclude that the question did not go to the source of the publication, wherefore the statute does not, in terms, apply ..." Id. at 487, 30 A.2d at 426.

It is important to note that strict construction of the word "source," and the statute generally, was and continues to be mandated by New Jersey law, as the statute is in derogation of the common law. In contradistinction to that principle, however, the Statutory Construction Act in Pennsylvania provides: "The rule that statutes in derogation of the common law are to be strictly construed, shall have *no* application to the statutes of this Commonwealth ..." Act of November 25, 1970, P.L. 707, added December 6, 1972, P.L. 1339, sec. 3, 1 Pa. C.S.A. §1928(a). (Emphasis supplied). Accordingly, we are not

persuaded that Donovan supports plaintiffs' position at bar in any respect.

Following Donovan, the Supreme Court of New Jersey decided *Brogan v. Passaic Daily News*, 22 N.J. 139, 123 A.2d 473 (1956). In *Brogan*, plaintiff, a city councilman and candidate for reelection, sued a newspaper for both compensatory and punitive damages as the result of the publication of an allegedly libelous article. The newspaper defended on the basis that: (1) The article was not libelous; (2) the newspaper published the article in good faith and with a reasonable belief in the truth of the article; (3) a retraction had been published; and (4) the article constituted fair comment on the subject and was published without malice.

The trial court ruled that defendant's sources were privileged under the New Jersey statute and, as a result, the jury did not impose punitive damages upon defendant newspaper.

The Supreme Court, reversing, awarded plaintiff a new trial and held that when a newspaper as a defendant in a libel action raises the defenses of fair comment and good faith, and its witnesses testify that its sources were reliable, the newspaper thereby waives the privilege of nondisclosure of sources afforded by the statute and may be properly cross-examined on the subject of such sources. In so holding, the court noted, generally:

"The position of the [reporter-witnesses] in this case is that they insist on asserting these defenses based upon the reliability of the source of information upon which they relied, yet refuse to disclose what those sources were, so that the jury could ascertain whether they were in fact reliable." ...

"The defendant cannot invoke the statutory privilege to render conclusive their own evaluation of the character and quality of the source. This is basic to due process ... The statute has no such sweep. It was not designed to reach this situation." Id. at 152, 123 A.2d 480-81.

One can find little fault with the logic implicit in the reasoning of the New Jersey court, adopted and advanced by plaintiffs at bar. Why indeed should a newspaper be permitted to advance as a libel defense the reliability of sources and

at the same time refuse to identify such sources? On the Federal level, the problem thus presented has been ably articulated in a recent opinion by Judge Haight, of the United States District Court for the Southern District of New York⁹:

"I conclude that a 'public figure' plaintiff in a defamation action is entitled to liberal interpretation of the rules concerning pre-trial discovery. I intimate no view on the merits of the present case; but one cannot close one's eyes to the possibility of malicious publications or statements concerning public figures. If the malicious publisher is permitted to increase the weight of the injured plaintiff's already heavy burden of proof by a narrow and restricted application of the discovery rules, so that the plaintiff is denied discovery into areas which in the nature of the case lie solely with the defendant, then the law in effect provides an arras behind which malicious publication may go undetected and unpunished. Nothing in the First Amendment requires such a result." *Herbert v. Lando*, 45 U.S.L.W. 2354 (February 1, 1977) (U.S.D.C.S.D.N.Y., January 4, 1977).

In *Brogan*, the Supreme Court of New Jersey was once again called upon to construe the New Jersey statute according to the newsman's privilege, and once again, applying the rule of strict construction of statutes in derogation of the common law, limited the application of the privilege. Again, we are under no such constraint and Taylor obviously adopts the contrary view.

Plaintiffs next point to and rely heavily upon *Beecroft v. Point Pleasant Printing & Publishing Co.*, 82 N.J. Super. 269, 197 A.2d 416 (1964), a case similar on its facts to the matter at hand. Plaintiff, Police Chief of Point Pleasant, N.J., sued for compensatory and punitive damages as the result of an allegedly libelous editorial published in defendant's newspaper. The newspaper defended upon the grounds, *inter alia*, that the editorial was published in good faith without malice, and that the editorial was within the bounds of fair comment on

9. The case also considers at length the perimeters of pretrial discovery in civil libel actions under the Federal rules.

the subject. The matter before the Superior Court of New Jersey concerned defendant newspaper's motion to strike several of plaintiff's pretrial interrogatories which asked defendant to disclose the facts upon which the editorial was based, and the identity of the sources of those facts. The newspaper refused disclosure on the basis of the statutory privilege.

The court noted first that the New Jersey legislature, after the decisions in *Donovan* and *Brogan*, had amended the statute by expanding the scope of the word "source," presumably to circumvent the *Donovan* decision, and to include the messenger or means of transmitting the information, but although aware of the decision in *Brogan*, did nothing to grant relief to newspapers from the mandate of *Brogan*.

The court next concluded that in its view, the legislative intent underlying the New Jersey statute was a desire only to protect news sources in criminal proceedings such as grand jury investigations. As additional support for such conclusion, the court again noted the New Jersey rule of strict statutory construction and the broad construction accorded the New Jersey rules of pretrial discovery. *Id.* at 276, 197 A.2d at 419, 420.

Noting finally that a libel action presented considerations "entirely different," the court found the rationale of *Brogan* controlling, denied the motion to strike plaintiffs' interrogatories, and held that by pleading the defenses of good faith, fair comment, truth and lack of malice, a newspaper thereby waives the privilege of nondisclosure of sources accorded by the statute. *Id.* at 280, 197 A.2d at 421, 422.

It is interesting to note that the version of the statute with which the Superior Court dealt in *Beecroft* provided that the privilege was considered waived in only two circumstances: When the newsman contracted with anyone not to claim it, and in the event of the voluntary disclosure of, or agreement to disclose, any part of the privileged matter. One may infer from the opinion, then, that the court either did not consider the statutory privilege applicable to discovery proceedings in libel actions, or in the alternative, even if the privilege does

apply, a judicially constructed waiver made the privilege unavailable:

"Thus, the voluntary interjection in the present case of the defenses of fair comment, good faith, truth, and lack of malice, while conceivably not within the scope of a waiver as defined by [the statute], can nevertheless be viewed as an act constituting an effective waiver as such." Id. at 279, 197 A.2d at 421.

Plaintiffs at bar would have us adopt a similar view for the identical reason. We again respond that the rule of statutory construction pertaining in New Jersey is not the rule in Pennsylvania. Not only are we required to interpret and construe statutes liberally, and in a manner that effectuates both the object of the statute and the intention of the legislature, rather than strictly (1 Pa. C.S.A. §§1921(a)-1928(c)), but we must presume that the General Assembly intends to favor the public interest as against any private interest: 1 Pa. C.S.A. §1922(5). The public interest to be served by permitting the free and unfettered news-gathering function of the press, as contrasted with the private interest in obtaining redress for defamation is fully discussed in *Taylor* and need not be repeated here. However, speaking in the context of a grand jury proceeding, the Supreme Court of Pennsylvania opined in singular language:

"The Act of 1937 is a wise and salutary declaration of public policy whose spiritual father is the revered Constitutionally ordained freedom of the press. The Act must therefore, we repeat, be liberally and broadly construed in order to carry out the clear objective and intent of the Legislature *which has placed the gathering and the protection of the source of news as of greater importance to the public interest and of more value to the public welfare* [footnote omitted] than the disclosure of the alleged crime or the alleged criminal." Id. at 42, 193 A.2d at 185-86. (Emphasis in original).

And unlike the New Jersey statute, the act in force in Pennsylvania contains no provision regarding waiver of the privilege. In the face of the quotation from *Taylor*, we cannot,

as noted earlier, create one for libel plaintiffs and engraft it upon the act.

Of similar significance, the court in *Taylor*, it will be recalled, defined the scope of a waiver and limited it to that portion of the statement of an informant actually published or publicly disclosed. Plaintiffs would have us force disclosure of confidential sources and the unpublished statements of informants by finding a waiver as the result of defendants having pleaded good faith and reliability of source.

A similar argument was advanced in *In re Bridge*, 120 N.J. Super. 460, 295 A.2d 3 (1972). Appealing an order holding him in contempt for refusing to reveal the contents of a statement made to him by a source already disclosed, a news reporter argued that the word "source" as used in the New Jersey statute protected not only the identity of the source of information, but also protected that part of the informant's statement not published.

The Appellate Division of the Superior Court of New Jersey disagreed, finding a waiver by the reporter as the result of publishing the identity of the source and a part of the information imparted by the source. It is instructive to note that New Jersey Evidence Rule 37, relating to waiver and incorporated in the New Jersey privilege statute, provides exactly that:

"A person waives his right or privilege to refuse to disclose . . . a specified matter if he . . . without coercion and with knowledge of his right or privilege, made disclosure of *any part* of the privileged matter . . ." N.J.S.A. 2A: 84 A-29. (Emphasis supplied).

Pennsylvania, of course, has no such statute and *Taylor* holds precisely the contrary.

We finally observe that *Taylor* was decided on July 15, 1963, and the act itself last amended by the Pennsylvania legislature on July 31, 1968, more than five years following *Taylor*. The amendment re-enacted the act as originally adopted, adding protection for persons employed by the electronic media and wire services. Although presumably aware of the

decision, the legislature again used the words "sources of any information," and no provision regarding waiver was added by the amendment. Section 3 of the Statutory Construction Act, 1 Pa. C.S.A. §1922(4), provides that when a court of last resort has construed the language used in a statute, there is a presumption that the legislative intends the same construction to be placed upon such language as used in subsequent statutes on the same subject. Thus, re-enactment of the identical language by the legislature following the decision in Taylor lends additional weight to the interpretation there placed upon the act by our Supreme Court.

In short, we must also interpret the act broadly and liberally, and in the public interest, and in so doing, do not find that defendants have waived the privilege of nondisclosure by defending the instant action upon the grounds asserted in their answer, or by identifying some of their informants.

Perhaps recognizing the difficulty inherent in the argument that the New Jersey decisions are dispositive of the issue before us, plaintiffs turn to the Federal jurisdiction and cite for our consideration two cases from the United States Courts of Appeal.

In the first of these, *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974), pet. dismissed, 417 U.S. 938, 94 S. Ct. 2654, 41 L. Ed. 2d 661 (1974), plaintiff, general counsel for the United Mine Workers of America, brought an action against Jack Anderson and his associate Britt Hume, based upon an allegedly libelous statement published in Anderson's Column, "Washington Merry Go-Round." At pre-trial depositions, defendant Hume refused to reveal the names of certain eyewitnesses to an allegedly illegal act committed by plaintiff except to say that such persons were employees of the United Mine Workers of America. Plaintiff moved to compel defendants to reveal the names under Fed. R. Civ. P. 37(a), and the District Court ordered defendants to do so.

Affirming the order to the District Court, the Court of Appeals relied upon *Garland v. Torre*, *infra*, and held that the question of compelling the disclosure of the source must be determined on a case-by-case basis, a view expressed by Jus-

tice Powell in his concurring opinion in *Branzburg v. Hayes*, *supra*:

"The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." [Footnote omitted] *Id.* at 710, 92 S. Ct. at 2671.

The Court of Appeals then found that the information sought by plaintiff went to the "heart" of plaintiff's libel action and, striking the balance, ordered disclosure.

The authority of *Carey* is subject to a three-fold limitation, however, in the context of the case at bar, and by the very opinion of the court that announced it. Firstly, defendant reporters in *Carey* argued as the only basis for nondisclosure that the First Amendment accorded newspapermen an absolute privilege. Subsequent to the argument but prior to the date of the opinion in *Carey*, the Supreme Court of the United States announced its decision in *Branzburg*, *supra*, holding that the First Amendment accorded newsmen no such absolute privilege.

Secondly, the Court of Appeals noted the limited record upon which it was called upon to act:

"What we have decided—and all that we have decided—is that the District Court cannot, on the limited record before us, be said to have abused the discretion vested in it to grant or deny a motion to compel discovery under Rule 37." *Cary v. Hume*, 492 F.2d 639.

The court left open the question of how it might have decided the case had the record revealed little or no likelihood of plaintiff's recovery, even with the benefit of the discovery he sought. *Cf. Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), cert. denied 409 U.S. 1125, 93 S. Ct. 939, 35 L. Ed. 2d 257 (1973), and *Ceritto v. Time, Inc.*, 302 F. Supp. 1071 (U.S.D.C. N.D. Calif. 1969), *aff'd per curiam*, 449 F.2d 306 (9th Cir. 1971).

Finally, and of particular significance, unlike Pennsylvania, there is no Federal statute conferring a testimonial privilege upon newsmen. Carey arose in the District Court for the District of Columbia, and the D.C. Code, there controlling, contains no such provision. See Carey, *supra*, at 636, n. 8. We are at bar dealing with a statute of Pennsylvania and the construction of that statute by the Supreme Court of Pennsylvania, unless and until it is declared to be unconstitutional, is again binding authority upon us. Carey in no way suggests a contrary result and the case must, therefore, be considered inapposite.

Lastly, plaintiff's rely upon *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910, 79 S. Ct. 237, 3 L.Ed. 2d 231 (1958), as authority for their position.

Judy Garland, plaintiff, sued the Columbia Broadcasting System and Herald-Tribune Columnist Marie Torre for libel as the result of allegedly defamatory statements made by an unidentified CBS executive and later published in the New York Herald Tribune under Torre's by-line.

Pretrial, plaintiff deposed Columnist Torre and in the course of the examination, Torre refused to identify her CBS source. Proceedings were commenced in the District Court to compel Torre to identify the source. The District Court directed Torre to disclose the name, and upon her refusal to do so, adjudged her in contempt.

On appeal to the Court of Appeals for the Second Circuit, Torre asserted three alternative arguments: (1) The First Amendment protects absolutely against disclosure of any source; (2) if not, then at least the First Amendment provides a qualified privilege and protects the identity of a confidential source; and (3) regardless of the first two arguments, the District Court abused the discretion granted it under Fed. R. Civ. P. 30 to make protective orders in that Torre's position as a journalist could be injured from her compulsion to testify, plaintiff might be able to obtain the information elsewhere, and plaintiff's claim was, in any event, of doubtful merit with the result that the information sought would probably prove of no actual use to plaintiff.

Although pre-*Branzburg*, the Court of Appeals found no absolute privilege against disclosure in the First Amendment¹⁰, found no qualified privilege in the absence of a statute creating one, and quickly disposed of Torre's last argument by finding no abuse of discretion on the part of the District Court in that the information sought by Garland was relevant and material. Torre's conviction of criminal contempt was affirmed.

In dismissing defendant's constitutional claim of privilege, the court noted that the question propounded of Torre "went to the heart of the plaintiff's claim." *Id.* at 550.

Seizing upon this language, plaintiffs' here tell us that the reporters' notes at bar contain information which goes to the heart of their claim, and as in *Torre*, this court should, regardless of the language of the Pennsylvania statute and Taylor, direct the disclosure of such notes.

It is first observed that at argument, plaintiffs' counsel, responding to a question by the court, asserted that without any of the material sought by them to be produced, plaintiffs' case was of sufficient strength to at least go to the jury. It will also be recalled that since the date of argument, defendants have provided plaintiffs with additional material. We must, therefore, question plaintiffs' contention that the reporters' notes go to the heart of plaintiffs' claim. Equally significant, we find *Garland* wholly inapposite to the case before us. Again, no statute of either New York or the Federal jurisdiction conferred a testimonial privilege upon reporters in *Garland*. *Id.* at 550. We are here dealing with an act of the legislature of Pennsylvania, but the *Garland* court was not. We are further confronted by a broad and liberal interpretation of our statute by a State court of last resort. The *Garland* court labored under no such burden, and was free to cast its holding in the mold it chose: the balance to be struck between

10. The court also concluded that freedom of the press, if in fact it is embodied in the First Amendment, "must give place under the Constitution to a paramount public interest in the fair administration of justice." *Id.* at 549.

the First Amendment freedom of the press and the societal interest in obtaining the testimony of all witnesses.¹¹ Thus, without regard to whether the notes at bar "go to the heart" of plaintiffs' claim, we are not at liberty to strike the balance in favor of plaintiffs, as it has already been struck for us by the court in *Taylor*.

Accordingly, as we observed in the case of the New Jersey decisions advanced by plaintiffs, we conclude that the Federal authorities cited by them are not controlling and offer no relief to plaintiffs. *Taylor* is binding upon us, however, and we find that although it arose in the context of a grand jury proceeding, its holding is sufficiently broad to encompass a civil libel action, and, as so stated, *Taylor* does not permit us to order production of the notes and memoranda made by reporters Ecenbarger and Lambert in the course of interviews with informants, whether disclosed or not and without regard to whether such notes or memoranda will reveal or lead to the revelation of the identity of confidential informants.

(2) *Production of Other Articles*

Plaintiffs also seek production of all articles published in *The Philadelphia Inquirer* and written by reporters Ecenbarger and Lambert, either individually or jointly with others. Defendants first refuse production on the ground that the articles are irrelevant to plaintiffs' cause, as such request must of necessity seek production of "many articles published by defendant [sic] William Ecenbarger and William Lambert on subjects that have nothing to do with the suit at hand."

Pa. R.C.P. 4009 under which plaintiffs here proceed, permits the inspection of documents subject, *inter alia*, to the limitations imposed by Rule 4007(a). The latter rule limits

11. "If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice. 'The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.' [citation omitted]." *Id.* at 549.

discovery to matters "relevant to the subject matter involved in the action."

We observe at the outset that plaintiffs endeavor to place the burden of showing irrelevancy on defendants, citing *Kaylor v. Baran*, 5 D.&C. 2d 567 (1956), standing as it does for the proposition that when a party objects to discovery on the ground of relevancy, the burden is upon the objector to establish irrelevancy. Defendants, to the contrary, assert that the burden of establishing relevancy is upon plaintiffs and requires in the first instance a showing of relevancy. Cf. *Lichtman v. Lipoff*, 10 D.&C. 2d 725 (1957).

We think the better view, in a case where the complaint and answer are already before the court as here, should require the court to determine on the basis of the pleadings whether there is any conceivable basis of relevancy, and, if there is, discovery should be permitted: 4 *Goodrich-Amram* §4007(a)-19, 118. Such view is in accord with the principle that in discovery proceedings doubts as to relevancy should be resolved in favor of relevancy: *Eversole v. Dinulos*, 13 *Lebanon* 4 (1970). We must, therefore, determine whether on this record articles written by defendant reporters are, or could conceivably be, relevant to plaintiffs' cause of action.

As former President Judge Davis said in *O'Connor v. Fellman*, 39 D.&C. 2d 51 (1966):

"... the test of relevancy in discovery proceedings under Pa. R.C.P. 4007 is not whether the anticipated answer to the proposed question can immediately qualify as admissible evidence, but whether the proposed question may possibly lead to an answer or answers which, alone or together, may be admissible and possess sufficient probative force to affect a material part of the cause of action." *Id.* at 54.

And see, to the same effect, *Rearick v. Griffith*, 27 D.&C. 2d 451 (1962), an able opinion by the late Judge Thomas A. Riley of this court.

Plaintiffs assert that other articles written by defendant reporters are relevant to the defense of good faith, as if defendant PNI intends to claim it relied upon the integrity of its reporters, Ecenbarger and Lambert, such defense might be

defeated upon a showing that the reporters had little or no experience or competence in the form of investigative reporting here involved.

We note that defendants' answer to the complaint raises several defenses including constitutional privilege,¹² fair and accurate reports of the activities and conduct of public officials and public figures,¹³ fair and accurate reports of judicial, administrative and governmental activities and proceedings,¹⁴ reports of "highly newsworthy matters of substantial public interest and concern,"¹⁵ and reports of matters of public record and thus privileged.¹⁶ Finally, in paragraph 22 of their answer, defendants aver:

"22. The publications complained of were written and published based upon reliable sources, in good faith, without malice, on proper occasion and with proper motives, in the

12. Paragraph 17 of defendants' answer avers, in its entirety that "[t]he publications complained of are protected speech and privileged under the First and Fourteenth Amendments to the Constitution of the United States and under the laws of the Commonwealth of Pennsylvania." Stripped to the bone, the paragraph appears to aver an absolute privilege. We point out again that there is no absolute privilege, and defamatory publication is not constitutionally protected: *Gertz v. Welch*, 418 U. S. 323, 341, 346, 41 L. Ed. 2d 789, 806, 809, 94 S. Ct. 2997, 3008, 3010.

13. See *New York Times v. Sullivan*, 789 *infra* (public official); *Curtis Publishing Company v. Butts*, 388 U. S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967) (public figure); and *Walker v. Associated Press*, 388 U. S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967) (public figure), the latter two, extensions of the former.

14. See *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975).

15. This defense appears to be cast in the mold of *Rosenbloom v. Metromedia, Inc.*, 403 U. S. 29, 29 L. Ed. 2d 296, 91 S. Ct. 1811 (1971). The doctrine set forth in the plurality opinion and the extension of *New York Times v. Sullivan* there proposed have been thoroughly discredited and effectively overruled, and in the words of Justice Powell, have become "unacceptable": *Gertz v. Welch*, 418 U. S. at 346, 41 L. Ed. 2d at 809, 94 S. Ct. at 3010; and see *Time, Inc. v. Firestone*, 424 U. S. 448, 454, 47 L. Ed. 2d 154, 163, 96 S. Ct. 958, 965 (1976).

16. See, again, *Gertz v. Welch*, *supra*, and its caveat concerning a publisher's "interpretation" of matters of record.

belief that the facts set forth therein were true and without any reason to doubt their truth."

The words "good faith" appear only in the quoted paragraph and are the words to which plaintiffs refer.

At bar, plaintiffs' complaint seeks not only actual or compensatory damages, but punitive or exemplary damages as well. The Supreme Court of the United States has held that without regard to whether a plaintiff in a libel action is a public figure or official, an award of punitive or exemplary damages can be constitutionally supported only upon proof that the libel defendant knew the published article was false, or published the article with a reckless disregard of whether the story set forth in the article was false or not: *Gertz v. Welch*, 418 U. S. at 349, 41 L. Ed. 2d at 810, 94 S. Ct. at 2997 (1974).¹⁷ Such standard has been equated to actual malice and, hence, the rule that punitive or exemplary damages may only be recovered in a libel action against a newspaper upon a showing that the defamatory article was published with actual malice: *New York Times Co. v. Sullivan*, 376 U. S. 254, 279, 11 L. Ed. 2d 686, 706, 84 S. Ct. 710, 726 (1964).

It is conceivable that an examination of other articles written by defendant reporters may well indicate that the articles at bar represent a first endeavor. We say, without intending to decide the question, that such fact might have imposed some duty upon PNI not otherwise imposed, and a duty which it failed to perform, and further, that the omission or failure is recklessness of the degree required by *New York Times Co. v. Sullivan* for the imposition of punitive damages.¹⁸

17. Plaintiffs' memorandum of law, p. 8, n. 2 to the contrary notwithstanding.

18. See, for example, *Cerrito v. Time, Inc.*, *supra*, detailing at length the elaborate procedures designed by Life Magazine to enable it to determine whether it might justifiably rely upon the accuracy of articles written by one of its reporters on the subject of organized crime.

In *Cerrito*, Life commissioned a veteran reporter, thoroughly accredited and recognized as an expert in the field of organized crime, to prepare a series of articles on the subject of organized crime in the United

We thus conclude that other articles written by reporters Ecenbarger and Lambert are relevant and will substantially aid plaintiffs at trial and should, therefore, be produced for inspection unless some other Rule of Civil Procedure bars production.

Rule 4011(a) prohibits discovery and inspection which is sought in bad faith. Rule 4011(b) prohibits the same when it will cause unreasonable annoyance, embarrassment, expense or oppression to any person or party, and Rule 4011(e) prohibits discovery and inspection which would require the making of an unreasonable investigation by, inter alia, any party or witness. Defendants object to plaintiffs' request to inspect all articles written by Ecenbarger and Lambert on these grounds as well.

Defendants ground their "bad faith" objection under Rule 4011(a) upon three bases: (1) The plaintiffs seek irrelevant material and such request, therefore, "could only have been made in bad faith," (2) plaintiffs' request for production was made with the intent to cause defendants unreasonable annoyance, expense and oppression; and (3) production of the articles would require the defendants to make an unreasonable investigation.

As is at once apparent, each of the grounds asserted by the defendants as constituting bad faith is itself a separate basis under Rule 4011 upon which discovery may be prohibited. No other ground upon which we might find bad faith is

States. As a part of his contract, the reporter asked that he not be required to reveal his sources of information because of the great potential of harm to such sources. Life agreed but by reason of the request and "aware of the developing law, went beyond the normal editorial review of the article," 302 F. Supp. at 1074. In addition to a careful and in-depth review by the editorial staff, Life hired an independent panel of experts to verify the reporter's statements and to then advise Life whether it was justified in relying on the accuracy of such statements.

We do not intend to suggest that PNI should have so acted instantly. We do say, however, that evidence of the procedures followed or not followed by PNI will certainly be admissible at trial as bearing on the issue of recklessness.

asserted by defendants. Accordingly, we examine each of the three bases individually, and if none have been established, we may not, on this record, find bad faith.

With respect to the first of these grounds asserted, that of relevancy, defendants are quite correct in their assertion that a request for production of irrelevant material may indeed be an exercise of bad faith in the context of the Rule 4011(a): *Fidelity & Deposit Co. of Md. v. Yeo*, 12 Bucks 448, 76 York 141 (1962); *Pottstown Lincoln-Mercury, Inc. v. Montgomery County Auto Sales, Inc.*, 2 D.&C. 2d 396 (1954). However, we have already determined that the articles are relevant, and a request for relevant material cannot without more be an exercise in bad faith.

As to the second basis, again defendants correctly state that discovery causing unreasonable annoyance, expense or oppression, or discovery designed to harass may be prohibited under Rule 4011(a), as made in bad faith, as well as being specifically prohibited by Rule 4011(b): 5A Anderson, Pa. Civ. Prac., §4011.11. We should thus decide whether production of the articles at bar will cause defendants unreasonable annoyance, expense and oppression. Unfortunately, we cannot, as defendants have failed to provide us with any facts whatever from which we might find or infer unreasonable annoyance, expense or oppression.

When the moving party has shown a prima facie right to discovery, the party raising an objection under Rule 4011 has the burden of proving that the objection is well founded: *White v. Wasco*, 57 Luz. 261 (1967); *Lichtman v. Lipoff*, supra; *Lippencott v. Graham*, 3 Bucks 16 (1953); *Minichino v. Borough of Quakertown*, 88 D.&C. 83 (1954); 5A Anderson, Pa. Civ. Prac. §4011.4. Plaintiffs have shown a prima facie right to discovery by seeking relevant material, and defendants have, therefore, clearly failed to carry the burden imposed upon them, as they have not advanced a single reason to support their objection. Excepting the use of the words "multitudes of articles," defendants have merely repeated the language of the rule in framing their objection. Simply because "multitudes" of articles may be involved does not, in and

of itself, permit us to determine that production imposes an unreasonable burden. All articles may well be in a single file, for example, easily and quickly available to the defendants.

We may not speculate as to the reasons why production might cause such results to follow, and in the absence of any facts at all upon which we might make a judgment, the objection cannot prevail.

Lastly, defendants object on the basis that production of the articles will require them to embark upon an unreasonable investigation, and, therefore, the request is again an exercise of bad faith on the part of plaintiffs, in violation of Rule 4011(a) as well as 4011(e).

Again, we should decide whether production would require an unreasonable investigation, but as before, defendants have failed to furnish us with a single fact upon which we might base such decision. Merely showing that production will occasion great investigative effort and expense, without some evidence that the burden so imposed would be unreasonable, is not sufficient to prevail under Rule 4011(e): 5A Anderson, *supra*, §4011.115. On this record, we are unable to determine whether any investigation is required, let alone an unreasonable investigation. Our discussion of the burden of proof upon the objecting party in connection with Rule 4011(b) is germane to an interpretation of Rule 4011(e). Defendants, again, by failing to provide us with any facts have thus failed to sustain the burden imposed upon them and the objection must be overruled.

Thus, finding the articles sought by plaintiffs to be relevant, and at the same time finding no substance in the objections to discovery interposed by the defendants, we will order the defendants to produce the articles.¹⁹

(3) *Performance Records*

By paragraph 6 of their motion for production, plaintiffs request all documents in the possession or control of the de-

19. In the event defendants determine in the course of accumulating the articles that some require an unreasonable investigation or expense, they may at that time present such evidence to the court and seek a protective order.

fendants "concerning the performance of either individual defendant in the course of his employment with Philadelphia Newspapers, Inc." Defendants resist production on the grounds that (1) such records are, again, irrelevant, (2) the request is made in bad faith, and (3) production is burdensome and oppressive, and will cause defendants to make an unreasonable and annoying investigation. In its memorandum of law at pages 15-16, defendants additionally assert that the request for "confidential and highly personal" records is designed to harass and annoy the defendants,²⁰ and that information contained in such records "could not possibly be utilized by plaintiffs' in their endeavor to prove the libelous character of the articles in question.

It was observed that during the course of oral argument, counsel for the parties continued to refer to the documents sought by the plaintiffs as "employment records." As we understand that phrase, it is important to say again that plaintiffs' request is not nearly so broad. Plaintiffs seek only records of the performance of the individual defendant reporters while employed by PNI.²¹

For the reasons set forth in our discussion on production of other published articles, we find performance records of the individual defendants relevant. Nor can we say that the request for production of such records is subject to limitations of Rule 4011 as advanced by defendants, again for the reasons that defendants have failed to place before us any facts to enable us to determine whether production is burdensome or oppressive, or will cause an unreasonable investigation.

Again we note that PNI may, at trial, defend its position by asserting the reliability of its reporters. Internal records maintained by PNI may serve to cast doubt upon the wisdom or propriety of such reliance. Clearly, the documents are rele-

20. One must assume that *all* discovery is to some degree annoying.

21. While plaintiffs might have phrased the request in more explicit language, it may well be that PNI management maintains records of performance ratings of news reporters. At least PNI admits to the possession of such material.

vant, and most assuredly are they so in the context of pretrial discovery.

Defendants also characterize performance records of defendant reporters as "confidential and highly personal." The records may well be confidential and personal, but so long as they are not privileged they are subject to discovery if they are relevant and will substantially aid in the preparation or trial of the case. Rule 4009 permits the inspection of all tangible things, subject only to the limitations imposed by Rules 4007(a) and 4011. The latter limiting rules do not prohibit discovery of confidential or highly personal documents,²² unless, as noted, such documents are privileged. Defendants cite to us no privilege and we are aware of none. Accordingly, the performance records of the individual defendants, if there are such, should be produced and we will so order.

ORDER

And now, to wit, March 16, 1977, defendants are hereby ordered to produce for inspection (1) all articles prepared by William Ecenbarger and William Lambert, individually, jointly or jointly with others and published in the Philadelphia Inquirer, and (2) all records pertaining to the performance of the said William Ecenbarger and William Lambert as news reporters while in the employ of Philadelphia Newspapers, Inc.; plaintiffs' motion for production of notes and memoranda made by the said William Ecenbarger and William Lambert of interviews of informants conducted in the course of preparing the articles which form the basis of the within litigation is hereby denied and dismissed; and except as herein otherwise provided, plaintiffs' motion for production is hereby denied and dismissed.

22. Interestingly, defendants do not assert that production of performance records would cause them "unreasonable embarrassment," which is a basis for denying discovery and inspection: Rule 4011(b).

ORDER

COURT OF COMMON PLEAS CHESTER COUNTY, PENNSYLVANIA

[Caption Omitted in Printing]

AND NOW, TO WIT, February 6th, 1981, upon consideration of the Plaintiffs' Motion for Partial Summary Judgment with respect to liability or in the alternative, to deem certain facts to be established for purposes of trial, and the Defendants' Motion for Summary Judgment, together with the pleadings, depositions, admissions, supporting affidavits, memoranda of law, and oral arguments, the Court orders as follows:

1. The Plaintiffs' Motion for Partial Summary Judgment with respect to liability is hereby denied;
2. The Defendants' Motion for Summary Judgment is hereby denied;
3. The Plaintiffs' Motion to deem certain facts to be established for purposes of trial, filed pursuant to Pa. R.C.P. No. 1035(c) is denied except as follows:

(a) The five newspaper articles which appeared in the corporate Defendant's newspaper, The Philadelphia Inquirer, on May 5, 1975, September 15, 1975, January 16, 1976, February 5, 1976, and May 2, 1976, and all statements contained therein, were "published" by the said corporate Defendant to third persons, and shall be deemed so for purposes of trial;¹

(b) The five said newspaper articles, and the

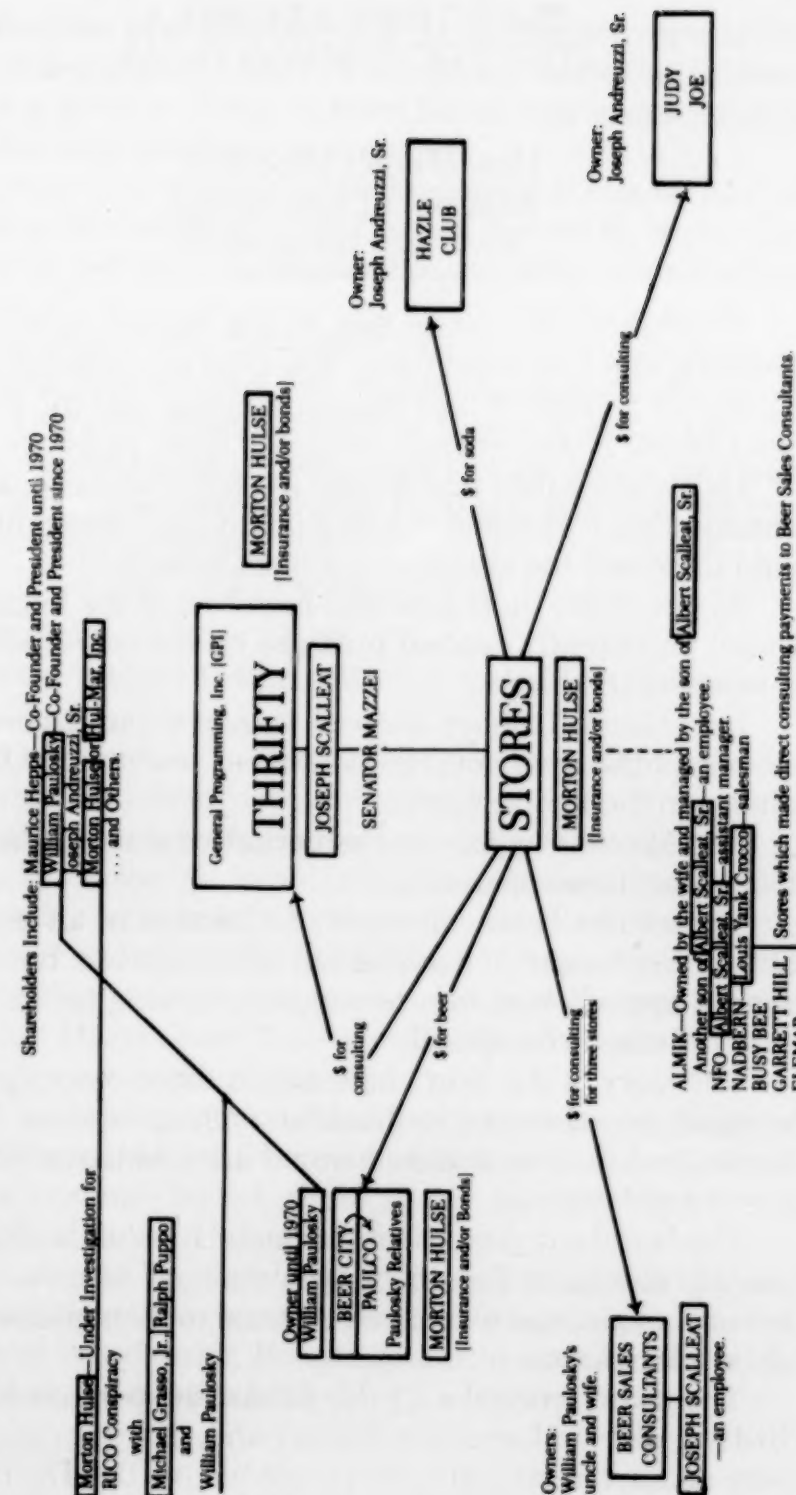
1. The Defendants do not seriously dispute the assertion that the articles were published by the corporate Defendant, and that the articles so published were prepared for publication by one or the other or both individual Defendants. We also judicially notice that The Philadelphia Inquirer is a newspaper of general circulation in the Delaware Valley. 45 P.S. §3(4); *Hepps v. Philadelphia Newspapers, Inc.* — Ches. Co. Rep. —, 3 D. & C. 3d 693, 694 (1977).

(d) As private figures, the Plaintiffs must prove, by a preponderance of the evidence, that the Defendants were negligent⁴ in publishing the allegedly false statements of which the Plaintiffs complain, in addition to proving the remaining elements of their action.⁵

By the Court

5. *Mathis v. Philadelphia Newspapers, Inc.*, 455 F. Supp. 406, 410-12 (E.D. Pa. 1978).

DEFENDANTS' EXHIBIT 18
COURT OF COMMON PLEAS



PLAINTIFFS' EXHIBIT 1
COURT OF COMMON PLEAS

MAY 5, 1975

**How Mazzei Used Pull,
 Kept Beer Chain Intact**

By WILLIAM ECENBARGER
 Inquirer Harrisburg Bureau

HARRISBURG—State Sen. Frank Mazzei, a Pittsburgh Democrat and convicted felon, has used his political muscle to preserve a chain of beer distributorships that the State Liquor Control Board ordered disbanded three years ago.

He accomplished this despite the fact that the liquor code contains legal restrictions against chain-type ownerships that could undersell the single-owner distributors.

As one of the most powerful members of the Legislature, Mazzei persistently applied pressure on the governor's office on behalf of the chain.

Gov. Milton J. Shapp allowed Mazzei to put his own man into one of the state government's most sensitive positions—counsel to the liquor board.

And Mazzei's appointee has permitted the once-banished chain to continue operating.

Mazzei has been convicted of extortion in an unrelated case and sentenced to five years in federal prison, but his colleagues have allowed him to continue serving in the Senate while his case is on appeal.

The story of the beer chain began three years ago when the liquor board moved to break up a chain of some 30 beer distributorships that it feared would drive independent operators out of business.

The board acted on the recommendation of its chief legal counsel, Alexander J. Jaffurs, who charged that the Thrifty Beverage chain was illegal and a threat to monopolize the retail beer business.

The board ordered a 21-day license suspension for three Thrifty outlets in Lancaster County and, in a test case for the entire chain, directed that the people behind the Thrifty operation sever their financial ties with the distributorships.

Before the penalties were imposed, Thrifty appealed to the Lancaster County Court. At this point, Mazzei began pressuring top aides to Shapp to have Jaffurs (an administration appointee) tone down his prosecution.

Mazzei had considerable leverage. He was one of the most powerful men in the General Assembly, which was then being asked to approve major administration-backed legislation.

In October 1973, Lancaster County Court upheld the liquor board and ordered the penalties carried out against Thrifty. This ruling was appealed to Commonwealth Court.

But three months earlier something important had happened: Jaffurs was fired suddenly by Shapp, who charged that Jaffurs was "incompetent." Jaf-

(See MAZZEI on 2-A)

How Mazzei Kept Beer Chain
State Senator Used Political Muscle to Aid His Business

furs said he was fired because he refused to yield to pressure from Mazzei and other powerful legislators.

About a year ago Shapp replaced Jaffurs with an obscure 71-year-old Pittsburgh Republican named Harry Bowytz. No one was quite sure how Bowytz got the job, but last week the mystery was cleared up. Richard Doran, Shapp's top aide, said he named Bowytz on the recommendation of Mazzei. Bowytz said he and Mazzei have "known each other for years." Mazzei could not be reached for comment.

The leadership behind the Thrifty operation is Maurice (Sonny) Hepps, 45, of Westtown, Chester County. Bowytz' wife is a longtime friend of the Hepps family—"Her father took my tonsils out," Hepps said last week.

Last August Thrifty abruptly dropped its appeal to Commonwealth Court, but instead of carrying out the penalties in the original board order, Bowytz sat down with Thrifty attorneys to work out a "stipulation."

Penalties Reduced

Bowytz agreed to a sharp reduction in the penalties against Thrifty. Instead of the original 21-day suspensions

(suspensions are severe penalties in the competitive "beer" business) he fined the three distributors \$1,000 each.

More importantly, Bowytz dissolved all existing management agreements between the distributors and Hepps firm, General Programming Inc.

But then Bowytz approved a new set of management agreements that keep the Thrifty chain intact.

Bowytz recommended that the outlets even be allowed to continue to use the "Thrifty" name, but he was overruled on this by the state attorney general. Otherwise, Bowytz' recommendations were accepted by the board last Jan. 15.

Most of the Thrifty distributorships are now putting up new signs—"Brewer's Outlet."

The revised consulting agreements between General Programming and the various outlets are quite similar to the ones that had been declared illegal by the Lancaster County Court, but Bowytz has said that they meet all the requirements of the Liquor Code.

The agreements are important because until Thrifty came along, distributorships in Pennsylvania traditionally were one-owner operations. The liquor code says, in brief, that no one person can have a financial interest in more than one distributorship.

Basis of Ruling

It was on this basis that the original Thrifty arrangement was outlawed by Lancaster County Court. The new management agreements approved by Bowytz still give Hepps a percentage of the gross profits of each store, and the distributors will lease their stores from Hepps.

Although he voted to approve the new agreements, Board Member Daniel Pennick concedes that they contain nothing to prevent General Programming from receiving "exorbitant" rentals from the distributors.

Hepps says his operation is the largest retail beer retailing network in the nation. His outlets undersell independents by as much as \$1 a case. Among the licensed Thrifty distributors are Hepps' friends and members of his family.

There is no visible financial link between Mazzei and the Thrifty operation, but there is a clear pattern of interference

in state government by Mazzei on behalf of Hepps and Thrifty.

The most serious occurred during the trial in Lancaster County Court. Writing on his official Senate stationery, Mazzei requested and received from the board copies of certain board records that he claimed he needed for legislative purposes.

Revised Agreements

But several days later these same records turned up in the hands of Thrifty attorneys, and were used against the liquor board in the court case.

George Lindsay, chief Thrifty lawyer, turned up on Mazzei's payroll in 1973 as an \$8,000-a-year consultant to the Transportation Committee.

Mazzei has several underworld associations, one of which is Joseph Scalleat of Hazleton, who is described by the State Crime Commission as a Cosa Nostra leader. Bowytz says he also is an "acquaintance" of Scalleat. Scalleat's wife is a licensed Thrifty distributor in Bucks County.

Mazzei's activities involving the liquor board are under investigation by the office of U.S. Attorney Richard Thornburgh of Pittsburgh, who prosecuted the senator on the extortion charge.

MAY 7, 1975

Clearing the Record

In Monday's editions, The Inquirer incorrectly stated that the wife of Joseph Scalleat was a licensed beer distributor in Bucks County. It is the sister-in-law of Mr. Scalleat, Rose Scalleat, who is the distributor.

It is the intention of The Inquirer that its news reports be fair and accurate in every respect. If you have a question or complaint regarding news coverage write the Public Service Editor, The Inquirer, 400 N. Broad St., Philadelphia, Pa. 19101, or call 854-2598 between the hours of 2 and 5 P.M. Sunday through Thursday. Each inquiry will be investigated and, when appropriate, a correction or clarification will be published.

PLAINTIFFS' EXHIBIT 2 COURT OF COMMON PLEAS

SEPTEMBER 15, 1975

While Shapp's Off Campaigning, Investigations Heat Up at Home

By WILLIAM ECENBARGER
Inquirer Harrisburg Bureau

HARRISBURG—As he crosses the nation in quest of the presidency, Gov. Milton J. Shapp's political future is imperiled at home by a series of investigations into his administration that has grown by the week.

At this moment, there are at least 21 investigations by federal, state and local authorities delving into actions of the governor himself, his top political associates, cabinet members and major gubernatorial appointees.

So far, Shapp's 1970 campaign manager has been convicted by two different federal juries of extorting more than \$100,000, the state treasurer of the Democratic Party has been convicted of forcing state employees to make political contributions, and four lesser state officials have been indicted on bribery, extortion and other charges.

Under investigation are Shapp's 1970 campaign finances, three top party officials, the Property and Supplies Department, the Transportation Department, the Revenue Department, the Liquor Control Board, the Racing Commission and the State Police.

It was disclosed last week that a federal grand jury in Pittsburgh planned to investigate widespread irregularities in the State Bureau of Professional and Occupational Affairs, which licenses doctors, pharmacists, real estate brokers, barbers and other groups.

In addition, The Inquirer has learned of these new developments in the major investigations:

- Julian Rothman, Shapp's brother-in-law and onetime appointment aide, has been subpoenaed to appear before a federal grand jury in Philadelphia this week. He will be asked about a mysterious \$10,000 cash contribution to the governor's 1970 campaign—apparently from a dairy firm interested

in relaxing state price controls on milk. Rothman left the governor's office in 1973 and moved to Florida.

- Frank Hilton, Shapp's 1970 campaign manager and former Secretary of Property and Supplies, who has been convicted of extortion, is scheduled to appear before a federal grand jury in Harrisburg on Sept. 24. Reliable sources said that Hilton had been granted immunity from prosecution to testify about what he did with kickbacks he received on state insurance policies.

- Federal authorities are investigating the Thrifty Beverage chain of beer distributorships, which has won a series of competitive advantages through rulings by the State Liquor Control Board. The investigators have found connections between Thrifty and underworld figures. A major Thrifty backer is former State Sen. Frank Mazzei, a Pittsburgh Democrat, who was convicted of ex-

(See SHAPP on 4-A)

While Shapp Campaigns, Investigations Heat Up

tortion and expelled from the Senate by his colleagues.

- Federal authorities are looking at the state's automobile purchasing practices to determine if official bid specifications have been rigged in favor of one manufacturer.

Shapp himself is scheduled to appear before a federal grand jury in Pittsburgh on Oct. 9 to explain \$20,000 in cash contributions after his election in 1970 by Michael Baker Jr., head of one of the world's largest engineering firms. The money was not reported by the governor as a campaign contribution.

The Inquirer reported last month that Pennsylvania's flood recovery plan was revised in 1972 so that a \$75,000, no-bid contract could be steered to Baker. His firm has received more than \$5 million in state contracts since Shapp became governor.

The Inquirer also has reported that Shapp was informed in September 1974, that an investigation by the Governor's Office had turned up evidence of corruption and mismanagement in the state's 21 occupational licensing boards. No steps were taken to correct the deficiencies at that time.

Licensing Commissioner Louis P. Vitti has resigned. But last week he was subpoenaed to appear before the federal grand jury in Pittsburgh.

The U.S. Securities and Exchange Commission has started a preliminary inquiry into Shapp's sale of his interest in a Willamsport cable television business in 1971 at a profit of nearly \$2 million. Before the sale, the Willamsport City Council approved a new 23-year franchise for the operation, and shortly thereafter two of the councilmen got jobs with the Shapp administration. Shapp has denied any connection with the granting of the franchise.

These top Shapp associates are under investigation:

- Dennis (Harvey) Thiemann, Democratic state chairman, has appeared before the Pittsburgh grand jury to answer questions on a pattern of political contributions and state contracts through the General State Authority, the state's capital construction arm.

- Egidio Cerilli, named by Shapp as chairman of the Pennsylvania Turnpike Commission, is under federal investigation for political kickbacks while he was the State Transportation Department's maintenance chief in Westmoreland County.

- Eugene L. Coons, Allegheny County (Pittsburgh) Democratic chairman and a prominent Shapp ally, is under federal investigation for allegedly accepting payments from underworld figures.

- Joseph L. Lecce, a former Shapp business partner, resigned as chairman of the State Racing Commission after questions were raised about track ownership. The State Justice Department is investigating charges of law enforcement, favoritism and conflicts of interest at race tracks.

- George J. Mowod, state revenue secretary, has appeared before a federal grand jury investigating his handling of sales tax collections.

- William J. Casper, Democratic state treasurer and an official in the Revenue Department, has been convicted of macing—forcing political contributions from state employees.

Also, federal and state investigators are looking into a widespread extortion scheme involving the Liquor Control

Board's top enforcement officers and at least 20 liquor agents. The State Justice Department and the FBI have found a pattern of kickbacks from tavern owners to liquor agents in exchange for quashing violation reports.

And last week a Dauphin County grand jury agreed to investigate an alleged State Police cover-up of traffic accidents involving state troopers who had been drinking. District Attorney Leroy Zimmerman claims that he has evidence in 11 cases.

Five Philadelphians have been indicted on federal charges of conspiracy, extortion and income tax evasion in connection with a smuggling operation to avoid payment of the state cigaret tax. The defendants include Vito N. Pisciotta, a Common Pleas Court judge; John R. Sills, former Democratic City Committee patronage chief; and three state cigaret agents.

Bernard Rasper, former State Revenue Department sales tax supervisor for the Philadelphia area, and one of his agents were convicted last month of extortion, conspiracy and bribery in the shakedown of an appliance dealer.

The State Justice Department is investigating the Military Affairs Department's hiring of Anthony Altavilla, a former Hilton aide who participated in Hilton's untrue explanation of his personal finances. After being dropped from the state payroll, Altavilla was quietly rehired to "inspect armories."

Federal authorities in Scranton are investigating a series of state leases negotiated under Hilton in which friends and political associates of Shapp rented office space to the state under favorable terms.

There are a number of investigations involving county maintenance offices of the Transportation Department.

The Philadelphia special prosecutor, Walter M. Phillips Jr., has indicted 15 employees of the Philadelphia maintenance office, including Supervisor Joseph Brocco. Eleven employees of the Mercer County highway district were indicted by a county grand jury last week, including the Democratic county chairman. On Thursday William Heller, Monroe County highway chief, pleaded guilty to perjury in federal court in connection with extortion on snow-plowing contracts.

PLAINTIFFS' EXHIBIT 3 COURT OF COMMON PLEAS

JANUARY 16, 1976

Beer Chain Probed for Mafia Tie

By WILLIAM LAMBERT and WILLIAM ECENBARGER
Inquirer Staff Writers

HARRISBURG—A federal grand jury has started an investigation of alleged Mafia ties to a chain of Pennsylvania beer distributorships that has won consistently favorable rulings from the Pennsylvania Liquor Control Board.

The convening of the secret grand jury here last week is the result of a one-year investigation by the Philadelphia Strike Force on Organized Crime into the "Thrifty Beverage" group of about 30 beer outlets in eastern and central Pennsylvania.

Federal officials refused to comment on the grand jury and would not confirm the existence of the investigation but reliable sources said the grand jury was looking into:

- The alleged relationship between the Thrifty chain and known Mafia figures in northeastern Pennsylvania.
- Whether the chain received special treatment from the Shapp administration and the Liquor Control Board.
- A possible connection between Thrifty and a number of small insurance companies controlled by organized crime.

The specific areas of possible illegality include fraudulent use of the mail on applications for state distributorship licenses and violations of

(See *THRIFTY* on 5-A)

Penna. Beer Chain Probed for Mafia Ties

state and federal banking laws in Thrifty's complex financial arrangements.

The initial witnesses before the grand jury were Strike Force personnel and other federal law enforcement officers who took part in the investigation.

The Inquirer has learned that a central figure in the inquiry was a midstate insurance broker who represented the

link between the beer and insurance industries and who has been subpoenaed to testify.

A former Liquor Control Board official has charged that Thrifty is involved in a conspiracy with state officials to create a monopoly that will wipe out small, independent beer distributors.

The Thrifty chain has been involved in a long legal dispute over a section of the state liquor code that forbids any person to have a financial interest in more than one beer distributorship.

The Thrifty chain operates this way: At the core is a consulting firm that issues franchises to individual beer distributors. The consulting firm provides the distributors with advice and allows them to use the Thrifty name.

In return, the distributors pay the consulting firm either a fixed fee or percentage of gross sales.

Many of the individual licensed Thrifty distributorships are run by associates and relatives of officers in the consulting firm.

A Bucks County outlet is controlled by Albert Scalleat, a nephew of Joseph Scalleat of Hazelton, Pa. Joseph Scalleat has been identified as a Mafia leader by the State Crime Commission.

One of the principal breweries supplying the Thrifty chain was Fuhmann & Schmidt (F&S) until it filed a voluntary bankruptcy petition last year. A major F&S owner is Joseph Lecce of Williamsport, a former business partner of Gov. Milton J. Shapp in the cable television industry and, until last year, Shapp's appointee as chairman of the state Racing Commission.

Four years ago the Liquor Control Board, through chief counsel Alexander Jaffurs, moved to break up the Thrifty chain on the ground that it violated the Liquor Code prohibition of multiple ownership.

After long proceedings, Jaffurs won his point in October 1973 when Lancaster County Court ordered the board to impose 21-day suspensions on the three Thrifty outlets in the test case and disband the chain.

But before the court ruling, Jaffurs was fired by Shapp, who called the chief counsel "incompetent."

Jaffurs, however, contended that he had been dismissed because he was "getting too close to Thrifty." Jaffurs said he refused to drop the case despite pressure from several state political figures—including former State Sen. Frank Mazzei, a Pittsburgh Democrat now serving a five-year federal prison term for extortion.

Jaffurs said that Mazzei had used the influence of his legislative office to obtain from the board official documents that were later used by attorneys for Thrifty in the court case. In addition, Geroge Lindsay, Pottsville attorney and a key figure in the Thrifty operation, was hired by Mazzei as a consultant to the Senate Transportation Committee.

After Jaffurs was fired by Shapp, the board failed to act on the Lancaster County Court order to break up the Thrifty chain and suspend the distributorships for 21 days each.

Shapp announced in April 1974 that he had hired Harry Bowytz of Pittsburgh to succeed Jaffurs as the chief counsel to the board.

The Inquirer learned that Bowytz was recommended to Shapp by Mazzei. Hired to assist Bowytz in board legal matters was James Deeley—Mazzei's nephew by marriage.

Bowytz met several months later with Thrifty officials and dissolved all existing franchise agreements, but then approved a new consulting arrangement almost identical to the one declared illegal by Lancaster County Court. The major change was in name—"Thrifty" became "Brewer's Outlet," which is the name the distributors use today.

Bowytz also reduced the penalties against the three Lancaster County outlets from 21-day suspensions to \$1,000 fines.

Independent beer distributors have banded together in a suit asking Commonwealth Court to compel the board to enforce the original Lancaster County penalties against the Thrifty operation. The case is pending.

PLAINTIFFS' EXHIBIT 4 COURT OF COMMON PLEAS

FEBRUARY 5, 1976

nsurer, crime link probed by U.S. jury

By William Ecenbarger

HARRISBURG—A federal grand jury investigating the influence of organized crime in the Pennsylvania beer industry is focusing on an aborted underworld attempt to seize control of a tiny Wisconsin insurance company.

The grand jury, holding secret sessions in Harrisburg, is investigating ties between the former Thrifty Beverage chain, which operates about 30 beer distributorships, and the Wisconsin Surety Co., which has been forced into liquidation by the Wisconsin Insurance Department.

The grand jury is following up on information developed over the past year by federal prosecutors, the U.S. Strike Force on Organized Crime, the U.S. Securities and Exchange Commission, postal inspectors and federal tax agents.

In addition, some of the information is under scrutiny by the Pennsylvania Securities Commission and state insurance officials in Pennsylvania and Wisconsin.

Elements of the story have been pieced together by The Inquirer from an examination of court records, contracts and other officials documents in Philadelphia, Harrisburg, Pottsville, Sunbury, Washington, D.C., and Madison, Wis.

The central figure in the inquiry is Morton F. Hulse, a Harrisburg area insurance broker, a principal in Wisconsin Surety who had extensive business dealings with Thrifty.

Two other Pennsylvanians, both cited by the State Crime Commission as Mafia leaders, also figure prominently in the inquiry. They are:

Michael Grasso Jr., an underworld figure in Philadelphia and Miami who tried, but failed, to take over Wisconsin Surety last year. The crime commission said that Grasso specializes in clandestine takeovers of tottering business enterprises. Grasso's uncle is Angelo Bruno, the reputed boss of organized crime in southeastern Pennsylvania.

Joseph Scalleat of Hazleton, Pa., named by the crime commission as a leader of organized crime in northeastern Pennsylvania. Federal agents have evidence of direct financial involvement in Thrifty by Scalleat, and Scalleat's nephew is involved in a Thrifty distributorship.

(See *PROBE* on 3-B)

Insurer and crime link probed

The grand jury also is seeking to determine whether the two enterprises received unduly favorable treatment in their dealings with the Pennsylvania Liquor Board and the Pennsylvania Insurance Department. The roles of at least two high state officials are being examined. They are:

Gerald Mongelli, a deputy state insurance commissioner who initially supervised Pennsylvania's handling of the Wisconsin Surety liquidation. Mongelli was a member of a law firm that did extensive corporate legal work for Thrifty.

Harry Bowytz, counsel to the Liquor Control Board, who has made several rulings favorable to Thrifty. Bowytz is a protege of former State Sen. Frank Mazzei, who was a behind-the-scenes Thrifty backer before being convicted of extortion and ousted from the Senate last year. Mazzei is now in prison.

The Thrifty chain, which has changed the name of its distributorships to "Brewer's Outlet," has been challenged by independent distributors as an illegal franchising operation, but it has survived because of several favorable decisions by the liquor board.

Wisconsin Surety was heavily involved in writing insurance for public construction projects in Pennsylvania. It was forced into liquidation last April after Wisconsin officials discovered that it illegally issued about \$8 million in policies.

Wisconsin officials said the firm has about 600 creditors across the nation, who are owed about \$10 million, but they had no breakdown on Pennsylvania creditors. The firm did business in 14 states and Washington, D.C.

Hulse was writing nearly all of Wisconsin Surety's business in Pennsylvania in 1974 when the company hit a cash

crisis, and he invested \$150,000 of his own money to gain control of the firm.

He also lined up other potential investors, including Grasso, who was convicted of defrauding the Federal Housing Administration in 1972 and placed on probation.

Grasso formulated a plan to refinance Wisconsin Surety, but Wisconsin insurance officials stepped in.

"No state would knowingly allow money that you would call underworld money to get into reputable businesses—or disreputable businesses—in this state," said an official in Madison.

Last April 11, a Wisconsin court, acting on a request from that state's insurance commissioner, ordered Wisconsin Surety into liquidation.

According to two independent sources, Hulse owns a block of Thrifty stock. Another source familiar with Wisconsin Surety's business operations said that Hulse had written insurance policies for Thrifty.

The Pennsylvania Securities Commission is investigating the transfer of Thrifty stock to Hulse. The transfer occurred despite a 1969 commission rejection of Thrifty's request to sell stock publicly.

The legal work on that request was handled by Pace Reich, a partner in the Philadelphia law firm of Modell, Pincus, Hahn and Reich. Mongelli was a member of the firm at the time, and he and Reich were law school classmates. Mongelli became deputy insurance commissioner last year.

Mongelli said he was unaware of Reich's relationship to Thrifty.

State Insurance Commissioner William Sheppard said "I see nothing wrong with" Mongelli's supervision of the Wisconsin Surety case in light of his former law firm's relations to Thrifty.

PLAINTIFFS' EXHIBIT 5 **COURT OF COMMON PLEAS**

MAY 2, 1976

How state officials toyed with insurance firm

By William Lambert
Inquirer Staff Writer

The Pennsylvania Insurance Department, charged by the Commonwealth Court with managing a small Valley Forge insurance company, squandered more than \$2 million of the company's assets in 19 months, an Inquirer investigation has established.

During that period, which ended last March, Insurance Commissioner William J. Sheppard held title to the firm, Colonial Assurance Co., as statutory liquidator of its insolvent parent, Gateway Insurance Co. of Philadelphia. His deputy, Gerald J. Mongelli, was Colonial's overseer.

Their separate roles in managing the company and its sale in March to a New York man for a bargain-basement price are currently under investigation by federal authorities.

Pennsylvanians ultimately will bear most of Colonial's losses through increased premiums for automobile, fire and homeowners coverage. That is because other insurance companies must pay assessments to meet Gateway's liabilities and are allowed to pass along those costs to policy holders.

Had Colonial been sold quickly, as it could have been, those assets would not have been wasted and could have been used to reduce Gateway's liabilities.

In a lengthy interview late last week, Sheppard and Mongelli told The Inquirer that the department had managed Colonial as "honestly and efficiently as possible," and in complete compliance with the law.

The story of the insurance department's stewardship of Colonial has been pieced together by The Inquirer through examination of official documents, company records and correspondence, and in interviews with former employees, government sources, prospective buyers of the company and insurance industry specialists.

Among the findings:

- When the department took over and began managing Colonial in August, 1974, its net worth was about \$5 million. By the time it was sold its value had dropped to about \$2.6 million.

- Mongelli once pushed hard to sell Colonial to John DePhillipo, a Philadelphian with reputed organized crime connections, but the department backed away when it learned that DePhillipo's financial angel was tainted by links to organized crime.

- Sheppard and Mongelli received a number of substantial offers for the company from highly reputable bidders but accepted none, and even dissuaded several likely buyers by bureaucratic maneuvering. In at least one case, they refused potential buy-

(See COLONIAL on 12-A)

How an insurance firm lost \$2 million ...

ers access to important financial records necessary to evaluate the company's worth.

- Last fall, as claims mounted, assets evaporated and disenchanted prospective buyers dropped out of the bidding, Colonial quietly stopped writing any new policies and in December quit renewing policies as they expired—actions that were destined to reduce the company's market value.

- Three months ago the department considered selling off Colonial's remaining assets, cancelling its valuable licenses in other states and folding the company altogether because its cash drain was increasing at an alarming rate.

- Under pressure from Sheppard to sell the company or liquidate its assets, Mongelli quickly negotiated its sale to Louis Mazzella, a New insurance broker, at a time when Mazzella's business activities were under investigation by the New York state insurance department.

- Since late in 1974, Mongelli has spent much of his time at Colonial's offices, running the company as if it were his own private fiefdom. With several of Colonial's top officers, particularly through last summer, he lived high off the company's

expense account, enjoying expensive meals and being chauffeured around by company officers in a company-leased Lincoln Continental Mark IV.

- Colonial's corporate insurance business was steered to Mongelli's own personal insurance broker, James Farrell of Philadelphia, by William F. Mack, an executive of Colonial and crony of Mongelli. (The new business, which included property-casualty insurance and employee benefits, provided Farrell \$3,000 in commissions last year.)

- Last year Mongelli appropriated some of Colonial's furniture, including several bookcases and chairs (his wife visited the offices to pick it out), and had company employees haul it to his Villanova home, where it was refinished. Meanwhile, it remained on Colonial's fixed assets ledger.

- Early this year, when Mongelli abandoned his Harrisburg apartment, its furniture was moved out in a rented truck by William F. Mack, by then Colonial's acting president, and another employee.

- Mongelli's bedroom furniture was unloaded at Colonial's headquarters and stored there in a previously unused rosewood-panelled office until late in February, when two company employees hauled it to his home.

Gateway collapsed

The Pennsylvania Insurance Department's stewardship of Colonial began with the collapse of its parent, Gateway, in mid-1974, when Sheppard learned that the Philadelphia company had at least a \$17 million deficit and possible massive other losses.

On Aug. 21, the Commonwealth Court declared Gateway insolvent, directed its liquidation and vested its title with Sheppard, whom state law designates as the liquidator for defunct insurance companies.

The reasons for Gateway's failure have not yet been fully explained. U.S. Postal and Treasury investigators suspect fraud and their findings are in the hands of U.S. Attorney Robert E. J. Curran in Philadelphia, but no indictments have been handed up.

In any case, Gateway's liabilities, which included outstanding claims and unearned premiums owed to policy holders plus huge bank loans, were variously estimated at \$50 million to \$100 million. But it had one healthy asset—Colonial.

Although Colonial, like Gateway, wrote mostly what the trade calls "nonstandard" insurance—that is, high-risk coverage requiring higher premium rates, much of it in ghetto areas—it was still actively selling car insurance, along with a few fire, homeowners and ocean marine policies.

During Gateway's precipitous decline in 1973, Colonial had lost \$572,700 on its insurance business and suffered a paper loss of about \$1 million on its securities portfolio, a victim of the depressed stock market. But it still had more than \$10 million in assets and a net capital and surplus of \$3.5 million.

Then in 1974 things had begun to look up. By the end of July, Colonial's net capital and surplus stood at \$4,298,965. On Aug. 28, a week after Gateway's insolvency was declared, Sheppard testified before a Pennsylvania legislative committee that "Colonial . . . is still an ongoing company which has approximately \$5 million in surplus."

Colonial finished 1974 with a net operating profit of \$830,244. Its paper losses in the severely depressed stock market stood at \$964,575, leaving a net capital and surplus that had shrunk to \$3.3 million.

Under state management during the last four months of 1974 and early in 1975, however, several decisions were made that were to accelerate the company's financial decline. Among them according to industry specialists asked to comment on The Inquirer's findings, were these:

- In September, 1974, Sheppard authorized Colonial to keep 68 persons on its payroll, part of them to help in Gateway's liquidation, although he himself admitted that the company had more staff than it needed. (His own guidelines for the company set a limit of 35.)

- One of Mongelli's early moves as overseer was to create an encumbrance that was aimed at enhancing the company's

appearance but certain to reduce its value to prospective buyers: he authorized a five-year lease of expensive and handsome office space in the modern Valley Forge Executive Mall as Colonial's headquarters.

- The lease, which called for annual payments escalating from \$64,597 to \$74,167 during its five year life, locked in Colonial for at least three years by prohibiting cancellation altogether until March 1978, and permitting it thereafter only if a penalty of \$33,350 were paid.

- The move from downtown Philadelphia to Valley Forge, which cost at least \$22,000, was completed in February, 1975. When the company's employees settled in they found the 9,570 square feet of space large enough to provide the equivalent of a 20-by-14-foot office for each, including officers, secretaries and file clerks.

- The furniture moved to Valley Forge was owned by a bankrupt sister company, and Mongelli negotiated its purchase by Colonial. He got a bargain, paying \$28,000 for furniture worth nearly \$100,000. There was only one catch—his purchases equipped the company for 54 employees when nowhere near that many were contemplated.

- Although an excess of nonstandard auto insurance written by Colonial had been one of its serious problems, board meeting minutes show that in the fall of 1974, to avoid "hardship for either brokers or insureds," the company violated its state-set guidelines and wrote up to \$200,000 more of that high-risk business than it had contemplated.

- Colonial continued to write nonstandard policies well in 1975, and in June alone put about \$300,000 worth of such dubious business on the books, before Sheppard finally ordered a halt to the practice. In July the company quit writing all auto insurance except for renewals, thus assuring a drop in its revenues.

- Sheppard failed in his attempts to persuade additional states to license Colonial for operations, which would have increased the company's value, and Mongelli privately voiced his embarrassment at that failure.

The puzzle

Those questionable management decisions and Sheppard's failure to get new licenses intrigue industry specialists—but not nearly so much as another Sheppard action: The failure of the commissioner, as statutory liquidator, to move as quickly as possible to sell Colonial as a functioning company to some reputable buyer for as much cash as he could get.

There was no shortage of offers. They began pouring in as soon as word spread through the industry that Colonial was for sale. Some would-be buyers were not so reputable. Others lacked ready cash and wanted to buy the company on the installment plan. But several had plenty of cash as well as impeccable reputations.

Yet the insurance department dawdled and kept turning aside offers, often to the puzzlement of the offerers, for more than a year and a half.

Just how much Sheppard concerned himself directly with Colonial's affairs during the 19 months its decline continued apace has not been established. What is apparent is that Mongelli took part in every prospective deal, often negotiating directly with the offerers.

Curiously, Mongelli's qualifications for his job seem, at best, limited. He has told a number of acquaintances, including the representative of a prospective buyer of Colonial, that he knew very little about the insurance business.

Yet he was hired by Sheppard in June, 1974, at a salary of \$25,819 a year, as deputy commissioner, with a broad range of responsibilities covering most of the operational functions of insurance company regulation. (He now earns \$29,614 a year.)

Mongelli, 46, is a lawyer. If he has a specialty it appears to be liquor law.

From October 1961 to August 1970, he held a part-time job in the Philadelphia city solicitor's office at \$9,787 a year and practiced law on the side. At the time of Mongelli's appointment, Governor Shapp's office said in a press release that the new deputy's earlier duties as assistant city solicitor "were

primarily in the areas of insurance company regulation and consumer protection." The solicitor's office, however, doesn't regulate insurance companies. The state does. Moreover, fellow employees at city hall recall that Mongelli's principal duties there concerned liquor licensing matters.

Before joining the insurance department, Mongelli was a member of the Philadelphia law firm of Modell, Pincus, Hahn and Reich, which has a wide practice in liquor law.

Indeed, his one-time membership in that firm and his subsequent handling as deputy commissioner of another defunct insurance company unrelated to Colonial had already brought Mongelli under the scrutiny of federal investigators and a grand jury in Harrisburg.

That grand jury had begun investigating an aborted attempt by organized crime figures to buy control of the troubled Wisconsin Surety Co. just before it collapsed into insolvency.

Wisconsin Surety had been linked to the Thrifty Beverage beer chain, which in turn had connections itself with organized crime.

Mongelli had been a member of the Modell law firm some years earlier when it represented Thrifty Beverage in a stock sale application before the Pennsylvania Securities Commission. Later, as Sheppard's deputy, he had initially supervised the state's liquidation of Wisconsin Surety.

Although Mongelli disclaimed knowledge of the law firm's association with Thrifty, the account had been handled by his former law school classmate and a partner in the firm, Pace Reich.

The Harrisburg inquiry is still underway, and The Inquirer has learned from sources close to it that a key figure under investigation was also involved in an unsuccessful underworld attempt to buy Colonial.

He is Morton F. Hulse, a Harrisburg area insurance broker, once a principal in Wisconsin Surety, who also had had extensive business dealings with Thrifty Beverage.

Sources say that Hulse was involved early last year in a scheme whereby Michael Grasso Jr., an exconvict and

nephew of Philadelphia Mafia boss Angelo Bruno, would arrange to put up the front money to buy Colonial through John DePhillipo, a Philadelphia businessman who was a friend to both Grasso and Michael Bruno, Angelo's son.

An early bidder

Documents made available to The Inquirer show that DePhillipo was among the early bidders for Colonial, and that his proposal was considered acceptable. They do not reveal his offering price, but other sources placed it at about \$2 million, with the state retaining a part of the company's securities portfolio for direct sale.

DePhillipo was the only one of several serious offerers who insisted on using Colonial in part to write surety bonds. Interestingly, the writing of surety bonds for Wisconsin Surety had been a Hulse specialty.

The minutes of a Colonial directors' meeting of Mar. 27, 1975, identified DePhillipo as having "extensive holdings in land development and building corporations." There is no mention of his insurance experience, if any.

Of a later meeting on May 9, which both Sheppard and Mongelli attended, the minutes reported that DePhillipo's offer was "all cash, up front," and that he had submitted a letter of intent to buy and a contract. They went on:

"Commissioner Sheppard then confirmed his desire to sell the company as soon as possible, however, he is obligated to get the best price . . . After considering all factors, Mr. DePhillipo's offer satisfies both obligations. If he gets a bank commitment, immediate steps should be taken to finalize a contract and to obtain Court approval for the sale . . ."

Sheppard and Mongelli were on the verge of closing the deal with DePhillipo when the department learned that he proposed to get the cash from an Ohio savings bank that legally was not permitted to lend money for such a purpose.

Mongelli says DePhillipo was turned away only because he "couldn't come up with the money."

Whatever the shortcomings of DePhillipo's offer, there were other offers with obvious merit. (Last November, Shep-

pard wrote to one prospective buyer that he had "hundreds of applicants expressing interest ...")

The first offer, in the fall of 1974, had come from Abe Lieber, a New Yorker identified by Colonial insiders as an exporter-importer. Board meeting minutes indicate he offered \$3.2 million, with an unspecified down payment and a "relatively short payoff period." But Lieber fell ill, and the proposal languished, never to be accepted.

In May, 1975, the minutes put the "latest offer" at \$3,332,000, although they do not specify who made it. Mongelli told the Inquirer the offer came from DePhillipo.

Of the many prospective bidders, three were highly respected companies with plenty of cash. Although one was to withdraw from the bidding and the other two were to be rejected (neither to this day understanding why), all three believed they had been treated cavalierly by Sheppard's department.

None of the three initially sought out Colonial. Rather, each was approached by Donald Pahl, a member of a Philadelphia insurance counseling firm, who asked for a finder's fee of \$100,000.

One company, Phoenix Mutual Life of Hartford, Conn., sought to enter the property-casualty field and asked the New York insurance department if it knew of any existing companies

(Continued on Next Page)

... while the state ran it for 19 months

for sale. Colonial was mentioned.

But before Phoenix got around to approaching the Pennsylvania department, Pahl telephoned a company officer and offered himself as the intermediary for a \$100,000 fee. Though a Phoenix Mutual spokesman declined to give details of its negotiations, other sources said the company offered Pahl only \$5,000.

Phoenix Mutual retained the accounting firm of Price Waterhouse to evaluate Colonial, and in July, 1975, it estimated the company's worth at \$3.4 million.

The Connecticut company, however, became frustrated by the insurance department's failure to negotiate reasonably, the sources said. It broke off negotiations and decided to organize its own property-casualty company.

Another hot prospect was the W. R. Berkley Corp. of New York city. In a telephone interview, W. R. Berkley said his firm, a holding company owning several insurance companies, was "ready, willing and able" to buy Colonial.

'Had the money'

"We had the money," Berkley said. "Our offer was that we would pay the fair-market value based on an appraisal of the assets. We would have deducted the finder's fee to Pahl from our appraisal in our offer."

"We thought they (the department) were going to sell the shell of the company and some assets and we would get the licenses in about 17 states. Our only problem was that they wanted to keep Colonial in Pennsylvania."

Berkley said that as of October, 1974, Colonial was worth just over \$4 million. Its capital and surplus on Oct. 31 was \$3,555,784.

(A company's capital and surplus total, according to industry sources, is generally considered the low end of its sale value. In determining total worth, additional values are assigned to existing licenses in various states, to physical assets such as furniture, to about 35 percent of premiums paid in advance by policy holders, and to good will, if any.)

(Colonial had very little "good will" for sale because of its public association with the defunct Gateway, and of course its assets, which consisted primarily of its stock-and-bond portfolio, varied with the ups and downs of the market.)

"I don't know what happened to the deal," Berkley said. "It was clear that there was no great anxiety on the part of the insurance department to sell Colonial. We never got around to making a firm offer, and we never heard from them again."

If the department's reception to the Phoenix Mutual and Berkley proposals could be reasonably described as less than warm, Mongelli and Sheppard's attitude toward the offer of Charter National Insurance Co., an Arkansas-chartered com-

pany headquartered in St. Louis, might be viewed as ranging from cool to downright hostile.

Charter National is a subsidiary of the American Investment Co., which also owns a life insurance company.

When Pahl approached Charter National early in 1975, he found a company anxious to enter the property-casualty business in the East and more than willing to buy Colonial with its licenses to operate in 16 states and the District of Columbia.

Robert J. Reid, Charter National's executive vice president, got the approval of the parent firm's directors and began negotiations in April with Jack N. Schreihofner, then Colonial's president.

"We desperately wanted the company and we were prepared to pay at least its fair market value, \$3.3 to \$3.7 million, whatever it might be," Reid told *The Inquirer*.

Late in May, Reid met Schreihofner at Colonial's offices. Reid recalled the events of that day:

"Schreihofner said I could talk to Mongelli and that's when things started getting a little weird. He introduced me to Mongelli, ushered us into a conference room, and then he excused himself and said the two of us could talk. He walked out and shut the door.

"Mongelli started ranting and raving, saying he wasn't really an insurance expert, that he was under a lot of pressure from the department and the press, and that the department didn't like insurance companies that were owned by financial companies.

"I told him we needed to know about Colonial's financial condition, that we would pay at least the market value of the company and if the department got into negotiations with others we might pay a premium. We were anxious to buy.

"Mongelli wanted to know whether we intended to protect the people working there, and I assured him we would need local employees. I also assured him that we would not cancel out the business (existing policies) wholesale.

"Mongelli then started explaining why they had signed a five-year lease for the offices. I couldn't understand why he

was so insistent on defending the lease because I hadn't raised any question about it.

"Of course they had too much space and our plan was to see if we could sublease some of it or buy out of the lease. They had almost 10,000 square feet, and (by then) only 23 employees.

"The whole discussion was strange. All in all, it was a pretty paranoid performance."

But, as Reid went on to explain, his meeting with Mongelli was just the beginning of a series of peculiar performances and arcane maneuvers by insurance department representatives.

On May 29, John S. Hughes, an attorney for American Investment, Charter National's Parent, wrote Sheppard a "letter of intent" to buy Colonial.

Although it did not state a price, it specified that cash only would be paid, some protection would be provided for Charter National against contingent liabilities that might not be immediately discernable, and that the Commonwealth Court as well as Sheppard would determine the fairness of the offer.

It also made clear that the \$100,000 finder's fee to Pahl would be paid separately from the offer, which Berkley earlier had been unwilling to do.

Charter National said it would keep the company in Pennsylvania, which appeared to be Sheppard's desire. The plan was to merge Charter into Colonial, with the latter's name retained.

For the next two-and-a-half months, Charter National representatives found themselves engaged in a game of hide-and-seek with insurance department officials, beginning when Reid, Hughes and another company lawyer, Charles J. Meler Jr., tried to get permission to examine Colonial's financial records.

"We would telephone Harrisburg and ask for Mongelli, only to be told he was in Philadelphia," Reid said. "Then we would call Philadelphia and they would tell us he was in Harrisburg. Finally we found that by calling Schreihofner we could

get a message to Mongelli and Mongelli would call us back—sometimes.”

Sheppard and Mongelli finally gave in to Charter National's pressure, and on Aug. 14 Meler started a two-day examination of Colonial's files. He found that its records prior to September 1974 had been impounded by postal authorities who were investigating Gateway.

At first, Mongelli agreed to permit inspection of the missing records, and Postal Inspector Richard McGee, who had custody of them, had no objection. But on Oct. 1, despite Meler's repeated pleas that he needed to determine if the impounded documents concealed any contingent liabilities, Sheppard refused access to them.

Finally, in mid-November, Meler received a letter from Sheppard which contended that Charter National had failed to supply information to the department necessary to complete the sale and had neglected to meet “guidelines” for the purchase.

When Reid saw Sheppard's letter he was furious. “I suspect Mongelli wrote it for Sheppard's signature,” he said. “Anyway, it was full of misstatements. I felt we had to correct the record so I wrote a letter to Sheppard.”

Reid angrily took Charter out of the bidding for Colonial. He told Sheppard:

“Knowing the bureaucratic roadblocks that you have at your disposal, we are not going to waste any more of our time and money attempting to acquire a company that in fact has decreased in values since we first looked at it . . .”

Then he offered Sheppard some advice:

Sheppard's defense

“To avoid further embarrassment to the Pennsylvania Insurance Department, I would strongly urge you to abandon your attempts to sell Colonial and liquidate it before it costs the industry and the taxpayers of Pennsylvania any more money.”

Sheppard told The Inquirer that the Arkansas insurance commissioner had discouraged him from negotiating a deal with Charter National because “it was in very bad shape.”

However, deputy insurance commissioner Ernie Fennell of Arkansas said in a telephone interview that the “financial problems of Charter National were not discovered until after it had suspended negotiations with Sheppard.”

Said Fennell: “These (Charter National) are honest folk. Charter National didn't know they were in trouble as a result of the failure of a company they were doing business with. When we told them, they immediately added \$5 million in cash to their reserves.”

Nonetheless, Sheppard might profitably have followed Reid's suggestion, because Colonial drifted rapidly downward during the closing months of 1975 and into the early part of this year.

The year-end financial report was prepared for filing in Harrisburg and it told the story in stark outline:

At the end of 15½ months of department ownership, Colonial's surplus had fallen from \$5 million to \$3 million. Put another way, under state stewardship its assets shrank at the rate of over \$30,000 per week. In 1975 it lost \$616,575 through operations, another \$72,300 in “non-admitted” assets—mostly uncollectible premiums from agents and brokers—and \$19,000 in excess surplus funds.

Only an upturn in the stock market, which gave the company a paper gain of \$425,000, prevented the year from being disastrous. But as it developed, the bottom wasn't yet in sight.

Industry specialists asked by The Inquirer to comment on Colonial's 1975 report expressed surprise at what they saw as an unwarrantedly high figure for salaries paid by the company during a year in which it earned premiums of only \$1 million. With fringe benefits, those salaries totaled about \$400,000. (At year's end Colonial's payroll numbered 17 employees, including clerks and secretaries.)

Rent and “rent items” totaled \$85,593. The costs of physically moving Colonial to Valley Forge were listed at \$10,415, but another \$55,694 reported for printing and stationery included a large figure for new letterheads and forms needed to reflect the new address.

Then there was an item none of the industry sources

could explain, considering Colonial's financial position and its purported impending sale: \$49,228 for travel expenses. Sheppard and Mongelli told *The Inquirer* last week that they couldn't explain it either.

As it became apparent that Colonial's financial condition was grave, insiders said, an air of desperation pervaded the plush Valley Forge offices, now mostly empty. By last January, the company's 17 remaining employees were engaged mainly in busy-work. There was little else to do.

In mid-February all but five employees were given dismissal notices.

Mongelli wondered aloud to associates how the press would react if Colonial's situation were to become public.

He made decisions and then revoked them, confusing employees. First, policy cancellations were to be speeded up and licenses in other states abandoned; then that was halted just as it got underway. A plan to sell Colonial's assets and put it out of business was considered, then dropped.

One thing was clear: the free-spending days were over. The happy expense-account lunches with Mack and Schreihof and other company officers since departed were a thing of the past. Instead of being chauffeured by Mack in a luxury company car, Mongelli now showed up driving his own brand-new Cadillac.

Colonial's cash flow had dwindled to a trickle. Its loss ratio—the measure of the amount it is paying in claims against its premium income—had shot up from an acceptable 71 percent in May, 1975, to a debilitating 187 percent in February, 1976.

Securities in the company's assets portfolio were being sold to pay policy claims as well as salaries and other operating expenses. Early in March, one such sale alone resulted in a loss of \$142,000 to Colonial because certain of the bonds sold were depressed in value.

From Dec. 31 to last Feb. 29, Colonial's capital and surplus plunged from \$3,049,529 to \$2,576,302.

The situation was grim. But waiting in the shadows, where he had been for months, was one remaining prospec-

tive buyer: Louis Mazzella. Why he was still around has been the subject of some cynical speculation within the department, since his earlier proposals had not been given much weight.

But now, insiders said, he seemed to offer a lifeline to the foundering Mongelli, who later told *The Inquirer*, "we resurrected him."

Mazzella's plan was to buy Colonial and put it, along with his Sentinell Brokerage Corp. and Sentinel Claims Adjusting Co. of Locust Valley, N.Y., under the umbrella of a new holding company call COLINCO (Colonial Investment Co.).

There was the question of money, but that could be resolved. After months of dawdling with other prospective buyers, the insurance department sprang to action. In a matter of weeks, Mongelli negotiated a deal with Mazzella and it was approved by Sheppard.

Mazzella bought Colonial, and what a bargain he got.

On March 3, Mongelli convened a meeting of Colonial's board to amend the company's charter. Its capital stock of \$2 million—10,000 shares at \$200 each—was cut to \$300,000 by reducing the required number of shares to 1,500. Its paid-in surplus was set at \$200,000. On March 10, Mazzella then bought the capital and surplus for its newly-established bottom-line figure—\$500,000—and paid for it in cash.

For his cash, Mazzella also got Colonial's \$23,000 worth of furniture, its valuable licenses in Pennsylvania and more than a dozen other states, and securities valued at \$1,271,547, part of which the department in effect wrote off against expected future claims liabilities and other expenses of Colonial.

The insurance department for its part took over what remained of Colonial's securities portfolio, worth \$2,248,163. Thus, with Mazzella's checks for \$500,000—and with last-minute adjustments—the department netted \$2,599,383, to be used in reducing Gateway's liabilities.

The department also got a dubious additional "asset," Colonial's accounts receivable, which at the date of sale consisted of \$33,854 in premiums due from insurance agents.

Although Sheppard disagreed, insiders said these were virtually uncollectible because agents were simply refusing to pay up, and under the terms of his purchase contract with the department, Mazzella is not required to guarantee their collection.

For Mazzella, the deal also frees him of one windfall surely to be costly and handed him another potentially profitable.

First, instead of buying the common stocks from Colonial's investment portfolio, which was priced much higher than it had cost when purchased years ago, he got Sheppard's agreement that those stocks would be retained and sold by the department.

That relieved him of the need to come up with the huge amount of cash the stocks were worth. More important, it freed him of any obligation to pay the company's federal capital gains taxes on those stocks.

And second, he acquired Colonial's 1975 book loss of \$723,972, worth, at the corporate tax rate of 48 percent, about \$351,000 when used as a tax loss carryover against Colonial's earnings through 1980.

Thus, on the first \$723,972 that Colonial earns in profits during the next five years, Mazzella will pay taxes of zero instead of \$351,000. That is one thing his \$500,000 bought him. So, in effect, he will have acquired the company at an actual out-of-pocket cost of \$149,000.

PLAINTIFFS' PROPOSED POINT FOR CHARGE NO. 28 COURT OF COMMON PLEAS

28. Plaintiffs contend that the defendants published articles in their newspaper which falsely asserted that the Thrifty chain had been banished by order of the Court of Common Pleas of Lancaster County; that State Senator Frank Mazzei, a convicted felon, used improper and illegal political influence to allow the Thrifty chain, in which he owned an interest, to continue to do business despite the fact that it was operating in violation of state law; that Senator Mazzei's motivation for protecting the Thrifty chain was not limited to his financial interest in the business, but also extended to the fact that the chain had a variety of ties to the Mafia through one Joseph Scalleat and others (and may even have been a Mafia-front organization); that Senator Mazzei himself was close to or owed allegiance to the Mafia; and that the Thrifty chain itself was closely connected with the Mafia and organized crime.

Plaintiffs contend that all of the above assertions are false. Defendants do not deny publication of these articles. Defendants have claimed, however, that the articles are true. Truth is a defense to a libel action. However, the burden is upon the defendants to prove by a fair preponderance of the credible evidence that at the time the articles were published, the articles, taken as a whole and in context, were true. *CORABI v. CURTIS PUBLISHING CO.*, 441 Pa. 432 (1971), 42 Pa. C.S. §8343(b).

PLAINTIFFS' PROPOSED POINT FOR CHARGE NO. 59
COURT OF COMMON PLEAS

59. In producing evidence in support of their contentions, defendants did not call any editor to testify concerning the scope of the editorial review given to these articles, they did not call any witnesses concerning plaintiffs' damage presentation, and they did not call as witnesses any sources other than Richard Doran. In particular, defendants did not call as a witness either Alexander Jaffurs or Edward Hussie. The general rule is that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and without satisfactory explanation, he fails to do so, an inference may be drawn that the evidence if produced would be unfavorable to him. The failure to call an available witness possessing peculiar knowledge concerning facts essential to a party's case gives rise to an inference that the testimony of such uninterrogated witness would not sustain the contention of that party. However, the rule is not operative unless it appears to you that the absent witness has peculiar knowledge or means of knowledge rendering his testimony of importance to the party in a position to call him, and it must first appear that this knowledge exists before the rule can be invoked.

Your inquiry on this point will be: (1) Is the absent witness available, or has his absence been satisfactorily explained? (2) Does the absent witness possess peculiar knowledge or means of knowledge rendering his testimony of importance to the party in a position to call him? If the witness is available and does possess such peculiar knowledge, then the jury may infer from the fact that he was not called that if he had been produced his testimony would have been unfavorable to the party whose duty it was to call him.

Laub, Trial Guide, §596.

PLAINTIFFS' PROPOSED POINT FOR CHARGE NO. 60
COURT OF COMMON PLEAS

60. Under the law of Pennsylvania, members of the media have a statutory right, which defendants have chosen to exercise in this case, to refuse to identify certain sources of information upon which they claim their articles were based, at least in part. The obvious impact of defendants' exercise of that statutory right in this case has been that plaintiffs were unable to question those sources, to determine their reliability or lack of reliability, to learn from the sources themselves what it was that they told to defendants, and otherwise to fully cross-examine those sources and probe their credibility and that of the reporters who relied upon them. You the jury may consider both defendants' decision to exercise this statutory right, and the effect that it has had upon plaintiffs' presentation at this trial as described above, in reaching your verdict. In other words, it is for you to decide what inferences, if any, should be drawn from defendants' failure to identify certain sources. You may infer, as you deem appropriate, that the defendants were simply endeavoring to protect their sources, or you may infer that, if the sources had been identified, that would have enabled plaintiffs to develop evidence adverse to defendants concerning the truth of the information supplied, and the existence, reliability and credibility of the sources.

DEFENDANTS' PROPOSED POINT FOR CHARGE

NO. 10

COURT OF COMMON PLEAS

10. Finally, in order for plaintiffs to establish defamation, they must prove by a preponderance of the evidence that the articles were false. *Wilson v. Scripps-Howard*, F.2d , 7 Med.L.Rptr. 1169 (6th Cir. 1981); *Medico v. Time, Inc.*, 643 F.2d 134, 146, n. 40 (3d Cir. 1981); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 274 n. 49 (3d Cir. 1980). See also, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, n. 10 (1974); *Time, Inc. v. Firestone*, 424 U.S. 448, 458 (1976). RESTATEMENT OF TORTS, SECOND, §580B, comment (J).

DEFENDANTS' PROPOSED POINT FOR CHARGE

NO. 66

COURT OF COMMON PLEAS

66. The law of this Commonwealth provides that a newsman need not disclose the source of any information obtained in the gathering of news. The basis for this rule is the widespread common knowledge "that important information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public duty . . . [or] crimes committed or possibly committed by public officials or by powerful individuals or organizations unless newsmen are able to *fully and completely* protect the sources of their information. It is vitally important that this public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion."

For this reason, I charge you that the newsreporters in this case had the absolute right and duty to refuse to divulge the sources of their information and to refuse to produce their notes and drafts. You are to draw no adverse inferences because this right was exercised. *In Re Taylor*, 412 Pa. 32, 41 (1963); *Hepps v. Philadelphia Newspapers, Inc.*, 3 D.&C.3d 693 (1977).

JURY CHARGE, COURT OF COMMON PLEAS

* * *

[3815]* Ladies and gentlemen, you have heard counsel use the term "burden of proof" several times. This is a most important concept and I would like to discuss it with you in some detail.

The plaintiffs, Ladies and Gentlemen, commenced this lawsuit, and it is therefore the plaintiffs upon whom rest the burden of proof with respect to their claims against the defendants. There is no burden of proof upon the defendants of any kind, with one exception—which we will discuss later.

The defendants have advanced a defense with respect to certain statements allegedly set forth in one or more of the articles known as the defense of conditional privilege.

The defendants therefore have the burden of proof with respect to the defense of conditional privilege, and I will discuss it a bit later, as earlier noted.

Returning, then, to the burden of proof upon the plaintiffs. Remember again that the party who commences the lawsuit has the burden of proving those claims that party makes against the defendants in the suit.

When a party has the burden of proof on a particular issue or issues, that party's position on [3816] that issue must be established by a measure or standard that we call a fair preponderance of the evidence.

That, then, as we say, is a measure or standard that the plaintiffs must meet—a fair preponderance of the evidence. Let us examine this rule.

The term "fair preponderance of the evidence" means evidence which when weighed against the evidence opposed to it has a more convincing force and the greater possibility of truth. Let me say that again.

The term "fair preponderance of the evidence means evidence which when weighed against the evidence opposed to

it has a more convincing force and the greater possibility of truth.

If it does not have such force or weight, or if it weighs so evenly with the evidence against it that you the jury are unable to say that there is a preponderance on either side, then your finding or verdict upon that issue must be against the party who has the burden of proof and in favor of the opposing party.

* * *

[3817] The term, fair preponderance of the evidence, means evidence which, when weighed against the evidence opposed to it has a more convincing force and the greater possibility of truth. If it does not have such force or weight, or if it weighs so evenly with the evidence against it that you the jury are unable to say that there is a preponderance on either side, then your finding or verdict upon that issue must be against the party who has the burden of proof and in favor of the opposing party.

Let us put it another way if you will.

Think of an ordinary balance or scale with a pan on either side. You have often seen that legendary lady wearing the blindfold and holding the scales of justice. Visualize and keep those scales in mind if you will in order to decide whether the party with the burden of proof has carried that burden of proof on the issues upon which that party has the burden of proof.

After considering all of the credible evidence—that is, the truthful and accurate evidence in this case, if you feel that the evidence presented by the party who has the burden of proof on a particular issue tips the scales in his favor, then that party has met or carried his burden of proof on that [3818] issue. On the other hand, if you feel that the evidence produced by the party not having the burden of proof tips the scales in his favor, then obviously the party having the burden of proof on that issue has not met his burden of proof.

Finally, if the scales are equally balanced, then the party having the burden has not met that burden, because the party having the burden, remember, must tip the scales in his favor.

*Numbers appearing in brackets refer to the page numbers of the original trial transcript.

* * *

[3830] Members of the Jury, the cause of action, or a civil action, as this case is called, is composed in all cases of a number of elements or parts. I am about to instruct you upon each of the elements or parts constituting an action founded upon defamation or libel—which I will refer to from then on as a “cause of action in libel”. But, before doing so, I will remind you that although there are a total of nine plaintiffs, you must consider the case of each plaintiff separately when considering whether the plaintiffs have carried their burden of proof.

Before a particular plaintiff may recover [3831] from the defendants, that particular plaintiff must prove each of the elements of the libel action by a fair preponderance of the evidence, and that particular plaintiff must also prove actual, or as we sometime call it, compensatory damages, to himself or itself, again, by a fair preponderance of the evidence.

Although I have referred to and will continue to refer to the plaintiffs as a group or class, remember again, you must consider the case of each plaintiff separately with respect to the questions of whether a particular plaintiff has proven each element of the libel action by a fair preponderance of the evidence, and, that particular plaintiff's damages, again, by a fair preponderance of the evidence.

Unless a particular plaintiff has proven each of the elements by a fair preponderance of the evidence as to that particular plaintiff, your verdict as to that plaintiff must be in favor of the defendants and against that particular plaintiff, and although you find that a particular plaintiff has proved each and every element of a libel action, unless you also find that such plaintiff has proved his or its actual or compensatory damages by a fair preponderance of the evidence, then that particular plaintiff cannot recover any damages from the defendants.

[3832] So saying, let us examine the cause of action in libel.

Members of the Jury, there are eight elements or parts constituting a libel action, and the plaintiffs must prove each

* * *

and every one of the eight elements by a fair preponderance of the evidence in order to prevail. Must tip the scales in his or its favor.

[3848] We turn then to an examination of the sixth element of the libel action.

To prove the sixth of the eight elements of the libel action, the plaintiffs must prove to you by a fair preponderance of the evidence that the allegedly defamatory statements contained in the articles, were false. Once again and quite simply:

To prove the sixth of the eight elements of the libel action, the plaintiffs must prove to you by a fair preponderance of the evidence that the allegedly defamatory statements contained in the articles, were false.

Thus, as a general proposition, if a defamatory statement is true, Ladies and Gentlemen, it cannot form the basis of an action in libel no matter how defamatory, if true, it cannot form the basis of an action in libel.

It is not necessary that a statement be literally true in every detail in order that it be considered not to be false so long as the statement is [3849] substantially true. Nor do minor inaccuracies or the omission of minor details render an otherwise truthful statement false. Nevertheless, although individual statements in an article may be literally true, if the article conveys a defamatory meaning by implication and innuendo, which meaning is false, then insofar as the law is concerned, the article is false.

Once again: Although individual statements in an article may be literally true, if the article conveys a defamatory meaning by implication and innuendo, which meaning is false, then insofar as the law is concerned, the article is false.

The proof of falsity thus must be directed at the gist or sting of the defamation. The test is whether the alleged libel, as published, would have a different effect on the mind of the reader than the truth would have produced.

Remember again, if defamatory implications and innuendo produced by an article are false, the literal truth of each

fact asserted in the article will not render the article true where the article read in its entirety implies additional defamatory statements.

In order to carry their burden with [3850] respect to the sixth element, then, the plaintiffs must prove by a fair preponderance of the evidence either that a defamatory statement in an article was false, or that while true, the statements in an article conveyed a defamatory meaning by implication and innuendo, which defamatory meaning was false.

I further instruct you, Members of the Jury, that in addition to your finding a statement or article to be false, you must also find that the false statement or article is defamatory.

It is proof of a false defamation by a fair preponderance of the evidence that the plaintiffs must show in order to prove the sixth element. Proof of a false defamation. It must be false. It must be defamatory. Mere proof of falsity without defamation is not sufficient, and proof of defamation without proof of falsity of the defamation is also not sufficient. Proof of a false defamation.

Remember, again, our definition of defamation, as given to you in the first element.

If the plaintiffs have failed to prove falsity as I have used that term, by a fair preponderance of the evidence, then your deliberations will cease, and once again, you will return verdicts in favor of [3851] the defendants and against the plaintiffs.

If on the other hand you find that the plaintiffs have proved the sixth element—falsity of a defamatory statement or article—by a fair preponderance of the evidence, you will then consider the seventh element of the action in libel—the element of fault on the part of the defendants.

As is obvious to you, Members of the Jury, we are here dealing with a lawsuit by a private person and private corporations against a newspaper. The newspaper, the Philadelphia Inquirer, is in some respects protected in its right to publish news stories by the First Amendment to the Constitution of the United States. In other words, the newspaper is privileged to do so. That privilege is conditional however, rather than

absolute, and even though a newspaper is protected in its right to publish by the First Amendment, it may be subjected to liability in a libel action if it publishes erroneous or false information which libels or defames a plaintiff, provided the plaintiff proves that when it published the libelous or defamatory material, the newspaper did so with fault.

We will discuss the degree and nature of fault the plaintiffs must establish by of course [3852] a fair preponderance of the evidence in order to carry their burden of proof with respect to this seventh element.

We begin our examination of this conditional or qualified privilege—that is, the privilege of a newspaper to publish with the general proposition that newspapers as publishers of news stories and articles are guaranteed the right to do so by the First Amendment as we have said. This right is constitutionally protected, even though it may be on occasion abused by publishers.

As James Madison, later to become President Madison, said nearly two hundred years ago, Ladies and Gentlemen, and I quote it:

“Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press.”

End of quotation.

Nevertheless, the people of this great nation have ordained in the light of history that in spite of the probability of excesses, abuses and falsehoods, the freedom of the press to publish is essential to the freedom of this nation itself. It is also fundamental that erroneous statements and [3853] falsehoods are inevitable in a free press, regrettable as such inevitability may be, and punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutional guaranteed freedoms of speech and press.

Our law recognizes that a rule of strict liability that compels a publisher to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship as the only alternative to liability.

Allowing the news media therefore to avoid liability only by proving the truth of all libelous statements does not accord adequate protection to First Amendment liberties that we discussed. Thus, the First Amendment requires that we protect some falsehood in order that we may ultimately protect important speech and communication.

At the same time, however, Members of the Jury, there is indeed a legitimate interest underlying the law of libel in Pennsylvania, and it can be briefly summarized as compensation of individuals for the harm inflicted upon them by defamatory falsehood.

As one of our great Supreme Court justices in Pennsylvania aptly put it a few years ago:

[3854] "A man's good name is as much his possession as his physical property. It is more than property. It is his guardian angel of safety and security. It is his lifesaver in the sea of adversity. It is his parachute when he falls from the sky of good fortune. It is his plank of rescue in the quicksands of personal disaster."

The individual's right to the protection of his own good name thus reflects our basic concept of the essential dignity and value of every human being.

As you can easily observe, then, some tension or conflict exists between the need to protect and foster a free, vigorous and uninhibited press on the one hand and the legitimate interest in compensating those persons wrongfully injured by the press on the other hand.

Our law has endeavored to strike a balance between these important and competing interests. In dealing with the plaintiffs' demand for the recovery of damages, a term I will define for you shortly, you are instructed that in order to prove the sixth element of the action in libel in this case, because of the constitutional privilege enjoyed [3855] by the Philadelphia Inquirer, as I have just described it to you, the plaintiffs, to prove by a fair preponderance of the evidence this seventh element, must prove again by a fair preponderance of the evi-

dence that the allegedly false and defamatory article or articles were written and published negligently—that is, written and published by the defendants without the exercise of reasonable care on the part of the defendants to determine whether the defamatory article or articles was or were true or false.

That's a rather long sentence. Let me repeat this important concept for you.

The plaintiffs, in order to prove by a fair preponderance of the evidence the seventh element of their libel action, must prove to you by a fair preponderance of the evidence that the allegedly false and defamatory article or articles were written and published negligently—that is, written and published by the defendants without the exercise of reasonable care on their part to determine whether the defamatory article or articles was or were true or false.

Let us examine carefully that word, "negligence". Again, the plaintiffs' case, remember, is based on the theory of negligence.

[3856] The legal term, "negligence", Members of the Jury is defined as the absence of reasonable care which a reasonably prudent or careful person would exercise in the circumstances presented in this case. Again:

The legal term, "negligence", is defined as the absence of reasonable care which a reasonably prudent or careful person would exercise in the circumstances of this case.

Negligent conduct then may consist either of an act or an omission to act when the circumstances give rise to a duty to act. In other words, Members of the Jury, negligence is the failure to do something which a reasonably prudent person would do, or negligence is the doing of something which a reasonably prudent person would not do in light of all the surrounding circumstances established by the evidence in this case. Again:

Negligence is the failure to do something which a reasonably prudent person would do; or negligence is the doing of something which a reasonably prudent person would not do in light of all the surrounding circumstances established by the evidence in this case.

[3857] You will note again in the context of this case that negligence is defined as the absence of reasonable care which a reasonably prudent or careful person would exercise in order to determine whether a defamatory article was true or false before writing or publishing that article.

You the Jury must decide whether the defendants exercised reasonable care in determining whether a defamatory article or articles were true or false. Remember again, "reasonable care" is defined as that care a reasonably prudent or careful person in the circumstances presented in this case would have exercised to ascertain if a defamatory article or articles was or were false before publishing that article or those articles.

You will also recall that one who fails to exercise such reasonable care is in the law, negligent. Thus, if you find a defendant or defendants failed to exercise the care a reasonably prudent and careful person would have exercised in the circumstances to ascertain whether a defamatory article was true or false, by a fair preponderance of the evidence, "care" known as "reasonable care" then you should find such defendant negligent.

On the other hand, if you do not find by [3858] a fair preponderance of the evidence that a defendant or defendants failed to exercise reasonable care in the circumstances to ascertain whether a defamatory article was true or false, then you will find such defendant or defendants not negligent.

Remember as well, when you come to consider the defendant, Mr. Ecenbarger, that he did not participate in the preparation of Exhibit P-5, and that the defendant, Mr. Lambert, did not participate in the preparation of Exhibits P-1, P-2, or P-4. Each of the reporter-defendants may only be held accountable for the article each wrote or assisted in writing.

In order to determine whether the defendants were negligent—that is—failed to exercise reasonable care to ascertain the truth or falsity of a defamatory article or articles, you can and should rely upon your experience and knowledge of human affairs in deciding whether a reasonably prudent person would have acted as the defendants did in investigating

and publishing the articles, given the circumstances of this case.

You may also consider other factors in determining whether the defendants acted as reasonable prudent persons under the circumstances in publishing [3859] a defamatory article on the basis of a check or lack of check as to the accuracy and defamatory character of an article.

The thoroughness of the check that a reasonable person would make before he published the article may vary with the play and interplay of these factors. The standard of care does not change, but its application may vary with the circumstances. One factor is the time element. Was the article a matter of topical or so called "hot news" requiring prompt publication to be useful—or was it an article in which time and opportunity were freely available to investigate? In the latter situation, reasonable care may in the circumstances require a more thorough investigation.

A second factor is the nature of the interests that the defendants were seeking to promote by publishing the article or articles. Informing the public as to a matter of public concern is an important interest in a democracy such as ours, but the spreading of mere gossip is of less importance. How necessary was the article to the readers in order to protect the interest involved? If there was no substantial interest to protect in publishing the article or articles to the readers of the Philadelphia [3860] Inquirer, then a reasonable person would be hesitant to publish the article unless he has a good reason to believe that it was accurate.

A third factor is the extent of the damage to the plaintiffs' reputations or the injuries to the individual plaintiff's sensibilities that would be produced if an article or articles proved to be false.

Was the article defamatory on its face? Would its defamatory connotation be known to a few persons? How extensive was the circulation of the article or articles? How easily might the plaintiffs protect their reputations by means at their own disposal?

In considering whether the defendants exercised reasonable care to ascertain whether a defamatory article was true or false, you may if you wish assess the reliability and nature of the sources relied upon by the defendants, their acceptance or rejection of various sources, their conduct in checking or failure to check upon assertions made by their sources, whether the defendants' sources were relating information such sources knew of personal knowledge or from hearsay, the motives the sources might have had in imparting information, and the [3861] nature and content of any information available to the defendants which confirmed or contradicted the defendants' sources.

* * *

[3883] Ladies and Gentlemen, before we conclude let us briefly review the eight elements of a libel action—doing it only in sentence form, each of which, remember, a plaintiff must prove by a fair preponderance of the evidence before that plaintiff may recover from a defendant or the defendants.

* * *

[3884] To prove the sixth element of the libel action, the plaintiffs must prove by a fair preponderance of the evidence that the defamatory statements contained in the article or articles were false. False defamation is the only actionable libel. False defamation. So falsity constitutes the sixth element of the libel action.

To prove the seventh of the [3885] eight elements of the libel action, the plaintiffs must prove by a fair preponderance of the evidence that the defendants were negligent in publishing the article or articles in suit—that is, that the defendants failed to exercise reasonable care to ascertain whether the articles were true or false. Remember also in your discussion and consideration of the seventh element the so-called Fair Report Privilege, and abuse of that privilege.

* * *

PRAECIPE FOR ENTRY OF JUDGMENT ON THE VERDICT

HEPPS v. PHILADELPHIA NEWSPAPERS, INC.

COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

TO THE PROTHONOTARY:

Kindly enter a judgment on the verdict, dated July 31, 1981, in favor of Defendants, in no amount, and against Plaintiffs* in the above matter, pursuant to Pa.R.C.P. 1039.

[Subscription Omitted in Printing]

*Maurice S. Hepps
General Programming, Inc.
A. David Fried (Thrifty)
Brookhaven (Thrifty)
Busy Bee (Thrifty)
Almik (Thrifty)
Lackawanna (Thrifty)
NFO (Thrifty)
Elemar (Thrifty)

Opinion

MAURICE S. HEPPS, et al.

IN THE COURT OF
COMMON PLEAS
CHESTER COUNTY,
PENNSYLVANIA

- vs -

PHILADELPHIA
NEWSPAPERS, INC.,
WILLIAM ECENBARGER
and WILLIAM LAMBERT

NO. 36 MAY TERM, 1976

CIVIL ACTION—LAW

BY SUGERMAN, J.

The instant "private figure" libel action was commenced by the Plaintiffs against Philadelphia Newspapers, Inc., the publisher of the Philadelphia Inquirer ("Inquirer"), and two of its reporters, William Ecenbarger and William Lambert. We need not recite the facts underlying the action as they are set forth at length in *Hepps v. Philadelphia Newspapers, Inc.*, 3 D. & C. 3d 693 (Ches. Co. 1977), an Opinion filed by the writer in response to a pre-trial Motion for discovery.

Suffice it to note that in a series of five "investigative" articles, published by the Inquirer, the Defendant-reporters linked the individual and corporate Plaintiffs to certain named "underworld" figures and to organized crime generally.

The case was tried to a jury for a period of nearly six weeks and on July 13, 1981, the jury returned a general verdict in favor of all Defendants. The Plaintiffs filed a timely Motion for a new trial, and following argument thereon, we denied the same. The Plaintiffs thereupon appealed to the Supreme Court of Pennsylvania¹, and we write pursuant to the mandate of Pa. R.A.P. 1925(b).

Upon our receiving notice of the Plaintiffs' appeal, we directed them to serve upon us a Statement of matters complained of on appeal ("Statement"): Pa. R.A.P. 1925(a). The

1. As will be seen *infra*, we declared a statute of Pennsylvania unconstitutional. Accordingly, the Supreme Court of Pennsylvania is vested with exclusive jurisdiction of such appeals. 42 Pa. C.S.A. §722(7).

Plaintiffs have served such Statement upon us, setting forth four issues, all essentially relating to the Court's final instructions to the jury. We address the issues in turn.

1

The elements of a cause of action for defamation and the respective burdens of proof have for some years been codified in Pennsylvania and are presently found in the Judicial Code² at 42 Pa. C.S.A. §8343. The latter section provides the following:

"§8343. Burden of proof

(a) Burden of plaintiff.—In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

- (1) The defamatory character of the communication.
- (2) Its publication by the defendant.
- (3) Its application to the plaintiff.
- (4) The understanding by the recipient of its defamatory meaning.
- (5) The understanding by the recipient of it as intended to be applied to the plaintiff.
- (6) Special harm resulting to the plaintiff from its publication.
- (7) Abuse of a conditionally privileged occasion.

(b) Burden of defendant.—In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

- (1) The truth of the defamatory communication.

2. Act of 1976, July 9, P.L. 586, No. 142, §2, effective June 27, 1978. The Judicial Code was of course in effect at the time of the instant trial.

(2) The privileged character of the occasion on which it was published.

(3) The character of the subject matter of defamatory comment as of public concern." (Emphasis added).

Prior to instructing the jury, at the conclusion of the trial, we declared 42 Pa. C.S.A. §8343(b)(1) which places the burden of proving the truth of a defamatory publication upon the defendant, to be unconstitutional as in violation of the First Amendment to the Constitution of the United States. More specifically, we ruled that in a libel action brought by a "private figure"³ against a media defendant, as at bar, the First Amendment requires that the *plaintiff* bear the burden of proving the *falsity* of the defamatory publication, and we so instructed the jury (N.T. 3848). Thus, we added an element to the Plaintiffs' cause of action: proof of the falsity of the publication. Our ruling was based upon our interpretation of *Gertz v. Robert Welch, Inc.*, *supra*, and decisions of two United States Circuit Courts of Appeal, discussed *infra*.

The Plaintiffs contend on appeal that our ruling was erroneous and base this contention upon three grounds: (a) the Supreme Court of Pennsylvania, in *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A. 2d 899 (1971) (hereinafter, "*Corabi*"), citing *Restatement of Torts* §613 (1938), specifically held that the burden of proving the truth of a communication is upon a libel defendant, and this Court, as a court of inferior jurisdiction, is bound by the holding in *Corabi*; (b) quite apart from *Corabi*, 42 Pa. C.S.A. §8343(b)(1) is constitutional; and (c) *regardless* of whether the latter section of the Judicial Code is constitutional, the Defendants have waived the right to challenge the constitutionality of the statute by failing to follow the notice requirements of Pa. R.C.P. No. 235. We examine each of these grounds briefly.

3. See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) (hereinafter, "*Gertz*"); *Avins v. White*, 627 F. 2d 637 (3d Cir. 1980).

(a)

As observed, the Plaintiffs contend that the issue is controlled by the decision of the Supreme Court of Pennsylvania in *Corabi*, and that as the issue before us is the same as that confronted by the Court in *Corabi*, and as we are a court of inferior jurisdiction, we are bound to follow *Corabi*. Certainly we are aware that a majority opinion of the Supreme Court of Pennsylvania is binding precedent upon the courts of Pennsylvania, *Commonwealth v. Mason*, 456 Pa. 602, 604, 322 A. 2d 357, 358 (1974), and we are not free to overrule the decisional law enunciated by that Court, *Hillbrook Apartments, Inc. v. Nyce Crete Co.*, 237 Pa. Super. 565, 573, 352 A. 2d 148, 152 (1975). *And see*, 10 P.L.E. Courts §81.

The Plaintiffs at the same time concede, as they must, that *all* Pennsylvania Courts, including of course the courts of common pleas, are bound to follow the decisions of the Supreme Court of the United States on all questions involving the construction and interpretation of the Constitution of the United States. *Commonwealth v. Ware*, 446 Pa. 52, 284 A. 2d 700 (1971), *cert. den.* 406 U.S. 910, 92 S. Ct. 1606, 31 L. Ed. 2d 821 (1972); *Commonwealth ex rel. Banks v. Hendrick*, 430 Pa. 575, 243 A. 2d 438 (1968).⁴ With these principles in mind,

4. Speaking to the question of the force of decisions of the United States Court of Appeals for the Third Circuit, interpreting the Constitution of the United States, our Supreme Court has said:

"When the United States Court of Appeals for the Third Circuit has held certain practices or procedures to violate federal constitutional right, its decision will be accepted and followed by the courts of this Commonwealth until the United States Supreme Court has spoken on the issue. *Commonwealth v. Negri*, 419 Pa. 117, 213 A. 2d 670 (1965). See also *Commonwealth v. Bennett*, 445 Pa. 8, 282 A. 2d 276 (1971)."

Schreiber v. Republic Intermodal Corp., 473 Pa. 614, 620 n. 5, 375 A. 2d 1285, 1288 n. 5 (1977). *And see*, *Commonwealth v. Whitner*, 241 Pa. Super. 316, 322 n. 9, 361 A. 2d 414, 417 n. 9 (1976):

"On questions of constitutional proportions, considerations of comity require that decisions of the Third Circuit be treated as binding authority, unless and until the United States Supreme Court speaks to the contrary. [Citations omitted]."

it is appropriate to briefly examine *Corabi* in order to determine the nature of the issue it *did* decide.

In *Corabi*, the plaintiff, a public figure, instituted a libel action against Curtis Publishing Company, seeking damages for the publication of an article in the Saturday Evening Post alleged to be defamatory. A jury returned a verdict in favor of the plaintiff and the defendant, Curtis, thereupon filed a motion for judgment notwithstanding the verdict, on the ground, *inter alia*, that the plaintiff failed to show by clear and convincing evidence the falsity of the article in question. The lower court denied the motion and the defendant appealed, essentially asserting before the Supreme Court that permitting a public figure libel plaintiff to recover against a media defendant without a clear and convincing showing of the falsity of the publication in suit would violate the defendant's "rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States". *Id.* at 439, 273 A. 2d at 903.

The Court squarely addressed the issue and held, adversely to the defendant,

"... counsel for Curtis claimed that, should the constitutional privilege [under the First and Fourteenth Amendments to the Constitution of the United States] be applicable, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964), and its progeny placed the burden on plaintiff to prove falsity rather than requiring defendant to prove truth. We do not agree, but such a contention does warrant that we re-examine the bases of some aspects of our law of libel in Pennsylvania in the light of the constitutional limitations placed thereon.

'It is fundamental in Anglo-Saxon jurisprudence that any man accused of wrong-doing is presumed innocent until proved guilty. This is the rule not only in our criminal courts but in the ordinary affairs of life.' *Montgomery v. Dennison*, 363 Pa. 255, n. 2, at 263, 69 A. 2d 520 (1949). Because of this

fundamental premise, 'in actions for defamation, the general character or reputation of the plaintiff is presumed to be good.' 53 C.J.S. Libel and Slander §210, at 317 (1948); accord, *Klumph v. Dunn*, 66 Pa. 141 (1871); *Chubb v. Gsell*, 34 Pa. 114 (1859).

As one consequence, as a general rule the falsity of defamatory words is presumed: 53 C.J.S. Libel and Slander §217 (1948). See *Hartranft v. Hesser*, 34 Pa. 117 (1859). Nevertheless, although ordinarily in order to be actionable words must be false, falsity is not an element of a cause of action for libel in Pennsylvania. Rather the opposite of falsity, truth, is a complete and absolute defense to a civil action for libel: *Schnabel v. Meredith*, supra; *Kilian v. Doubleday & Co., Inc.*, 367 Pa. 117, 79 A. 2d 657 (1951); Restatement of Torts §582 (1938). See also, *Matson v. Margiotti*, 371 Pa. 188, 88 A. 2d 892 (1952); *Montgomery v. Dennison*, supra; and the Act of April 11, 1901, P.L. 74 §2, 12 P.S. 1582. And the burden of proving the same rests upon the defendant: *Montgomery v. Dennison*, supra; *McAndrew v. Scranton Republican Pub. Co.*, 364 Pa. 504, 72 A. 2d 780 (1950); 53 C.J.S. Libel and Slander §217; Restatement of Torts §613, comment h (1938). Moreover, it is manifestly the fair thing to place upon the defendant the burden of proving truth: *Montgomery v. Dennison*, supra, n. 2 at 263; 9 Wigmore, Evidence §2486, at 27 (3d ed. 1940)." *Id.* at 448-50, 273 A. 2d at 907-8. (Footnotes omitted). (Emphasis added).

As is thus readily apparent, this aspect of the decision in *Corabi* makes clear that (1) the Court was interpreting the Constitution of the *United States*, and (2) as the common law presumed a libel plaintiff's reputation to be good, and thus presumed the falsity of a defamatory publication, the burden of proving the *truth* of a defamatory publication was properly placed upon a defendant.

We consider the second of these postulations *infra*. With respect to the first, suffice it to note, in response to the Plaintiffs' contention that *Corabi* is binding upon us, that if the United States Supreme Court has ruled upon the issue, it is the pronouncement of *that* Court, and not *Corabi* that is binding upon us.

(b)

As we have observed, the Plaintiffs next contend that quite apart from *Corabi*, the placement of the burden of proving truth upon a media defendant as required by 42 Pa. C.S.A. §8343(b)(1), is constitutional within the framework of the First Amendment. We, of course, disagree and turn to an examination of the decisions that underlie our finding 42 Pa. C.S.A. §8343(b)(1) unconstitutional.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (hereinafter, "*New York Times*"), the Court held quite clearly that a public official bears the burden of proving falsity "with convincing clarity". *Id.* at 279-80, 285-86, 84 S. Ct. at 725-26, 728-29, 11 L. Ed. 2d at 706, 710.⁵ See also, *Cox Broadcasting Corp. v. Cohn*, *supra*; *Garrison v. Louisiana*, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964); *Goldwater v. Ginzburg*, *supra*.

5. In *New York Times*, the Court held that the Constitution of the United States prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not". *Id.* at 279-80, 84 S. Ct. at 726, 11 L. Ed. 2d at 706. Such rule obviously places the burden of proving falsity upon a public official. See, R. Sack, *Libel, Slander and Related Problems*, III.3.2, at 135 (1980) hereinafter, "Sack". See also, to the same effect, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975); *Goldwater v. Ginzberg*, 414 F. 2d 324 (2d Cir. 1969), *cert. den.*, 396 U.S. 1049, 90 S. Ct. 701, 24 L. Ed. 2d 695 (1970), *reh. den.* 397 U.S. 978, 90 S.Ct. 1085, 25 L. Ed. 2d 274 (1970); *Pape v. Time, Inc.*, 294 F. Supp. 1087 (N.D. Ill. 1969), *rev'd on other grounds*, 419 F. 2d 980 (7th Cir. 1969), *rev'd*, 401 U.S. 279, 91 S. Ct. 633, 28 L. Ed. 2d 45 (1971).

It is therefore beyond peradventure that the burden of proving falsity is upon libel plaintiffs who are public officials or public figures,⁶ and the Plaintiffs do not suggest otherwise. The Plaintiffs assert, however, that since *Corabi* was decided in 1971, *no* decision of the Supreme Court of the United States has squarely held that the First Amendment precludes the states from placing the burden of proving truth upon a media defendant in a "private" figure libel case. *Plaintiffs' Memorandum*, at 7. The Plaintiffs do concede, however, that "certain courts throughout the nation" have construed *Gertz* to so hold. *Plaintiffs' Memorandum* at 8.

In *Gertz*, decided nearly three and one-half years subsequent to *Corabi*, the Supreme Court of the United States said:

"We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation." *Id.* at 347-48, 94 S. Ct. at 3010-11, 41 L. Ed. 2d at 809-10. (Emphasis added).

Thus, in language the essence of clarity, the Supreme Court of the United States has held that the First Amendment prohibits the imposition of liability upon a media defendant without fault in a private figure libel action. *Id.* And as *Corabi* points out, "as a general rule the falsity of defamatory words is presumed..." *Id.* at 449, 273 A. 2d at 908. We reiterate, as we did at the time we declared 42 Pa. C.S.A. §8343(b)(1) to be

6. The holding of *New York Times* was extended to "public figure" plaintiffs in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).

constitutionally infirm, that a rule, as enunciated in *Corabi* that places the burden of proving truth upon a defendant, when coupled with a presumption of falsity may result in the imposition of liability without fault—precisely the result that *Gertz* forbids. Thus it is that when a trier of fact is unable to determine the truth or falsity of an assertion in a defamatory publication, he must render his decision *against* the party having the burden of proof. In such case, application of 42 Pa. C.S.A. §8343(b)(1), and the *presumption* of falsity, permits liability without fault.

In *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F. 2d 371 (6th Cir. 1981) *cert. granted*, 454 U.S. 962, 102 S. Ct. 500, 70 L. Ed. 2d 377 (1981), *cert. dismissed pursuant to Rule 53*, 454 U.S. 1130, 102 S. Ct. 984, 71 L. Ed. 2d 119 (1982), a “private figure” libel action, the plaintiff filed suit in Tennessee against a media defendant for defamation. The Tennessee courts at the date of trial, followed the common law as set forth in *Restatement of Torts* §§518, 613(2) and placed the burden of proving truth upon a defendant, as an affirmative defense. Although falsity was an element of a cause of action for defamation, *Id.* at §§558(a), 531A., once a publication was shown to be defamatory, falsity was presumed.⁷ The trial court (United States District Court For The Western District of Tennessee) in *Wilson v. Scripps-Howard*, *supra*, instructed the jury in accordance with the Tennessee rule and placed the burden of proving truth upon the media defendant. *Id.* at 373.

The Court of Appeals first observed that the question of whether *Gertz* requires that the burden of proving falsity be upon a private figure libel plaintiff was one of first impression for Federal appellate courts. *Id.* at 374. The Court then specifically held that “fault” as that word was used in *Gertz* consists of two elements: carelessness and falsity. *Id.* at 375. Reversing the District Court, the *Wilson* Court said:

“This common law allocation of the burden of proof is drawn into question by the constitutional prohibition against liability without fault established

in *Gertz*, 418 U.S. at 347-48, 94 S. Ct. at 3010-3011. The language of *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), and later cases makes clear that the burden of demonstrating the falsity of the defamatory statement rests on the plaintiff when the malice standard applies. *See, e.g., Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S. Ct. 209, 215 13 L. Ed. 2d 125 (1964) (public official must establish that the utterance was false); *Rosenblatt v. Baer*, 383 U.S. 75, 84, 86 S. Ct. 669, 675, 15 L. Ed. 2d 597 (1966) (same).

The same rule requiring the plaintiff to prove falsity is required under the First Amendment in libel cases based on negligence or some other standard of fault of lesser magnitude than malice. The Supreme Court in stating that ‘demonstration that an article was true would seem to preclude finding the publisher at fault,’ *Time, Inc. v. Firestone*, 424 U.S. 448, 458, 96 S. Ct. 958, 967, 47 L. Ed. 2d 154 (1976), has suggested that falsity is an element of fault in defamation cases. . . .

The Supreme Court has said that before the status quo is changed judicially in libel cases by an award of money damages against the publisher, the First Amendment requires that the plaintiff prove fault. *Falsity is an element of fault under the First Amendment that should be proved and not presumed.* The District Court therefore erred in placing the burden on the defendant. As a matter of federal First Amendment law, the burden must be placed on the plaintiff to show falsity.” *Id.* at 374-76. (Emphasis added).

Addressing the reason for its holding and interpretation of *Gertz*, the *Wilson* Court said:

“In addition, a rule that places the burden of proving truth on the defendant permits the imposi-

7. *Corabi*, as noted, follows this rule. *Id.* at 449, 273 A. 2d at 908.

tion of liability without fault in certain situations. '[W]hen the trier of fact is unable to determine the truth or falsity of a proposition of fact, he must render his decision against the party having the burden of proof. Consequently, in a jury trial the judge by allocating the burden of proof decides each issue of fact which the jury is unable to decide' *E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation* 70-71 (1956). When the jury is uncertain on the issue of the truth or falsity of the statement, as it may have been in the present case, it must find in favor of the plaintiff. A presumption of falsity thus permits liability without fault in the close case, in the case in which the jury is uncertain. See *County Court of Ulster County v. Allen*, 442 U.S. 140, 99 S. Ct. 2213, 2224-30, 60 L. Ed. 2d 777 (1979), a criminal presumption case discussing the significant effect that burden-shifting presumptions may have on the outcome of a close case and requiring a close causal connection between the proved fact and the presumed fact. In libel and slander cases generally, there is no particular causal connection between the proved fact (the making of a derogatory statement) and the presumed fact (the falsity of the statement). There is no particular reason to presume falsity." *Id.* at 375-76.

While not binding upon us, the holding in *Wilson* is indeed persuasive insofar as it interprets *Gertz* and applies the latter to private figure libel actions.

In *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y. 2d 369, 397 N.Y.S. 2d 943, 366 N.E. 2d 1299 (1981), citing *Cox Broadcasting Corp. v. Cohn*, *supra*, the New York Court of Appeals held that in a public figure libel case, the burden is upon the plaintiff to prove the falsity of the publication. *Id.* at 1305. Shortly thereafter, the New York Supreme Court, Appellate Division, in *Fairley v. Peekskill Star Corp.*, 445 N.Y.S. 2d 156, ____ N.E. 2d ____ (1981), citing *Rinaldi*, *supra*, and *Wilson v.*

Scripps-Howard, *supra*, as authority, held in a private figure libel action that the burden of proving falsity was upon the plaintiff. *Fairley v. Peekskill*, 445 N.Y.S. 2d at 158, ____ N.E. 2d at ____.⁸

In *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A. 2d 688 (1976), the Maryland Court of Appeals following *Gertz*, adopted the negligence standard of fault in private figure libel actions and then said,

"It is to be noted that under the negligence standard which we adopt here, truth is no longer an affirmative defense to be established by the defendant, but instead the burden of proving falsity rests upon

8. Addressing the dichotomy the Plaintiffs at bar endeavor to carve in stone—public figure v. private figure plaintiffs—the *Fairley* Court said:

"The above instances of lack of defamatory meaning, however, are not the only deficiencies in the plaintiff's case. The plaintiff never demonstrated that questions of fact exist concerning the falsity of many of the statements.

We note that at common law the defamed plaintiff had no such burden. The defendant was required to prove truth as a defense (see 1 Seelman, *Law of Libel and Slander in New York*, par 392). More recently, however, in cases against a media defendant, the defamed plaintiff has been required to prove falsity but only after he has been found to be a public official or a public figure. In *Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y. 2d 369, 380, 397 N.Y.S. 2d 943, 366 N.E. 2d 1299, the Court of Appeals stated that '[t]his requirement follows naturally from the actual malice standard. Before knowing falsity or reckless disregard for truth can be established, the plaintiff must establish that the statement was, in fact, false.' We see no significant distinction where the plaintiff is held to be a private figure and the topic of the article is a matter of public concern. In such cases the plaintiff is required to prove gross irresponsibility (see *Chapadeau v. Utica Observer Dispatch*, 38 N.Y. 2d 196, 199, 379 N.Y.S. 2d 61, 341 N.E. 2d 569) resulting in a defamatory falsity. Under such circumstances, proof of falsity is again naturally related to the standard of care. Thus, in a case with constitutional implications such as the one at bar, the defamed plaintiff must prove falsity, irrespective of his status (see *Wilson v. Scripps-Howard Broadcasting Co.*, 6 Cir., 642 F. 2d 371)." *Id.* at 158. (Emphasis added).

the plaintiff, since, under this standard, he is already required to establish negligence with respect to such falsity." 350 A. 2d at 698.

The same Court, in *General Motors Corporation v. Piskor*, 277 Md. 165, 352 A. 2d 810 (1976), a private figure defamation action, expounded upon its earlier holding in *Jacron*:

"Little need be added here to what we said in *Jacron*, since, like that case, this is one of purely private defamation. There, we read *Gertz* as being applicable to defamation actions brought by private persons without regard to whether the subject matter was one of public or general interest. In adopting the *Gertz* principles as a matter of state law, we held that they applied to cases of slander and libel alike brought against non-media defendants. Accordingly, we held that the negligence standard set forth in Restatement (Second) of Torts §580B (Tent. Draft No. 21, 1975) must be applied in cases of purely private defamation. Under this negligence standard, truth is no longer an affirmative defense; instead, the burden of proving falsity rests upon the plaintiff. Further, fault, in cases of purely private defamation, must be established by the preponderance of the evidence.

In conformity with what was then controlling state law, the trial of the defamation claim in this case proceeded on the premise of liability without fault, rather than upon some greater standard such as negligence. Since the *Gertz* and *Jacron* principles are equally applicable here, we hold that a new trial is required where the plaintiff shall be required to establish the liability of the defendant through proof of falsity and negligence by the preponderance of the evidence, and may recover compensation limited to actual injury as defined in *Gertz* and *Jacron*." *Id.* at —, 352 A. 2d at 815. (Footnotes omitted).

Against this background, the United States District Court For the District of Maryland, in *Jenoff v. Hearst Corporation*, (D.C. Md. unreported), a private figure libel action, against a media defendant instructed the jury, in accord with *Jacron*, that the burden upon the plaintiff included the requirement that the plaintiff prove that the defamatory statements were false. The jury returned a verdict for the plaintiff.

Affirming this placement of the burden, the United States Court of Appeals For The Fourth Circuit said, in *Jenoff v. Hearst Corporation*, 644 F. 2d 1004 (1981):

"In a charge that was comprehensive, precise and correct in its definitions, and expressed throughout in simple language, the District Court instructed the jury as to the elements of defamation, the allocation of burdens of proof, and the method by which damages were to be proved and calculated. Particularly, the Court charged that to find for Jenoff they must believe that he had shown by a preponderance of the evidence that Hearst's publication of the statements was negligent, that the statements were false and defamatory, and that the statements caused Jenoff's injury. The verdict fulfilled these exactions." *Id.* at 1008.

We turn next to the decisions from Pennsylvania which were available to us at the date of our ruling. In *Steaks Unlimited, Inc. v. Deaner*, 623 F. 2d 264 (1980), a public figure libel case, the United States Court of Appeals For The Third Circuit, held, as was to be expected, that the plaintiff, as a public figure, must prove "with convincing clarity that the [media defendants] broadcast false statements knowing of their falsity or with reckless disregard of the truth". The Court then said, "There are two elements to this standard: First [the plaintiff] must prove that at least some of the material contained in the broadcast was false."⁴⁹ Second, it must prove that the defendants broadcast such material with [actual malice]" *Id.* at 274-75. In footnote 49, above, and citing *Corabi*, the Court observed, by way of dictum:

"49. Pennsylvania's placement of the burden of proving the truth of the communication on the defendant, *Corabi v. Curtis Publishing Co.*, 441 Pa. at 449-50, 273 A. 2d at 908-09, would appear to be contrary to the constitutional limitations on state libel law enunciated by the Supreme Court. See, e.g., *Gertz*, 418 U.S. at 347 n. 10, 94 S. Ct., at 3010 (rejecting Justice White's view that it would be constitutional for a state to require libel defendants to prove the truth of an allegedly defamatory statement); *New York Times*, 376 U.S. at 271, 84 S. Ct. at 721 ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . and especially one that puts the burden of proving truth on the speaker."). Inasmuch as the district court concluded that there exists a genuine issue of fact regarding the truth of some of the broadcast material, 468 F. Supp. at 783, and because the defendants have not challenged the decision on this appeal, we have no occasion to review either the correctness of the district judge's decision or the constitutionality of Pennsylvania's placement of the burden of proof." *Id.* at 274-75. (Emphasis added).

It should be again noted that *Gertz* was a "private figure" case. As such, the presumed reliance upon its holding by the Court of Appeals would appear to apply to *all* libel cases, whether commenced by public or private figure plaintiffs. Of course, we are aware that dicta in a footnote to an Opinion by the United States Court of Appeals For The Third Circuit is not binding upon us. Nevertheless, we were and remain persuaded by its logic.

We were next privy to the decision of the same Court in *Medico v. Time, Inc.*, 643 F. 2d 134 (1981) *rehearing and rehearing en banc den.* 643 F. 2d 134 (1981). In the Opinion in the latter case, authored by the same Circuit judge who wrote for the Court in *Steaks Unlimited*, *supra*, once again, by way of dictum, the Court said:

"Although the common law placed the burden of proving truth on the defendant, this allocation may run afoul of recently announced constitutional principles. See note 38 *infra*. Because we dispose of the present case on the basis of the fair report privilege, we have no occasion to resolve this constitutional issue, or to consider whether Pennsylvania courts would continue to apply the republication rule to a newspaper account of defamatory remarks, see Part VII & note 42 *infra*." *Id.* at 137 n. 8.

And again:

"40. Placement on the plaintiff of the burden of demonstrating that a privileged report was not fair and accurate traditionally distinguished the fair report privilege from the truth defense, in which defendant bore the burden of proving truth, see *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 449-50, 273 A. 2d 898, 908-09 (1971). After *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), it is doubtful that a state can place the burden of proving truth on the defendant. *Gertz* held that a plaintiff in a defamation action must be required to demonstrate 'fault' on the part of defendant, *id.* at 347, 94 S. Ct. at 3010, and rejected Justice White's suggestion, offered in dissent, that a publisher may be required to prove the truth of a defamatory statement concerning a private individual, *id.* at 347 n. 10, 94 S. Ct. at 3010 n. 10. We have earlier questioned whether Pennsylvania's placement of the burden of proving truth on the defendant survives *Gertz*, see *Steaks Unlimited, Inc. v. Deaner*, 623 F. 2d 264, 274 n. 49 (3d Cir. 1980), and at least one member of the Pennsylvania Supreme Court has expressed similar reservations, see *Moyer v. Phillips*, 462 Pa. 395, 341 A. 2d 441, 447 (1975) (Roberts, J., concurring). But see, Eaton, *supra* note 33, at 1381-86, 1429 [sic: n. 34; Eaton, *The Ameri-*

can Law of Defamation Through *Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349 (1976)] (*Gertz* tolerates common law rule of presuming falsity of defamatory publication, and placing on defendant burden of proving truth)." *Id.* at 146 n. 40.

Thus, although the Court of Appeals For The Third Circuit has not specifically reached the issue of the placement of the burden of proving truth or falsity, the Court left little doubt as to its view on the subject.

The Supreme Court of Pennsylvania has not squarely considered the issue since its pre-*Gertz* decision in *Corabi*. However, in *Moyer v. Phillips*, 462 Pa. 395, 341 A. 2d 441 (1975) in which the Court decided that a cause of action for libel survives the death of the defendant, Justice Roberts, concurring noted that at common law, the burdens of proving truth and privilege were quite heavy and generally required testimony from a defendant in order to defend the action. Consequently, Justice Roberts wrote, the legislature could quite properly single out a cause of action for libel to abate with the death of the defendant. However, Justice Roberts, joined by Justice Nix, noted:

"... a substantial change in the law of defamation was wrought by the decision of the United States Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). That case held that, as a matter of constitutional law, liability for defamation may not be imposed without some showing of fault, amounting at least to negligence, on the part of the defendant. *Id.* at 345, 94 S. Ct. at 3010; see Restatement (Second) of Torts §§580A, 580B (Tent. Draft No. 21, 1975). This change drastically shifts the burden of proof in defamation actions and thereby reduces the unusually heavy burden heretofore placed on defendants in such actions. In proving the necessary element of fault to make out his cause of action, the

plaintiff will necessarily have to prove facts that would ordinarily negate the existence of a conditional privilege. *Id.* Topic 3, Special note, at 46-47. Similarly, as a practical matter, the plaintiff will find it necessary to prove the falsity of the statement in order to establish the necessary element of fault; to this extent, the defendant is relieved of the burden of proving truth as a defense. *Id.* §582, comment b., & §580B, comment i." *Id.* at 446-47 (Footnotes omitted) (Emphasis added).

Once again, while the concurring Opinions of two justices of the Supreme Court are not binding upon us, they are persuasive.

Finally, in *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa. Super. 475, 448 A. 2d 6 (1982), *pet. for allowance of appeal den.* Sept. 30, 1982, 301 Pa. Super. 475, 448 A. 2d 6 (1982),⁹ a case involving a libel action by a police sergeant (public official) against a newspaper, Judge Spaeth, writing for a panel of the Superior Court of Pennsylvania and, citing the concurring Opinion of Justice Roberts in *Moyer v. Phillips*, *supra*, and the Decision of the Sixth Circuit in *Wilson v. Scripps-Howard Broadcasting Co.*, *supra*, unequivocally placed the burden of proving falsity upon a libel plaintiff, without reference to the public figure-private figure dichotomy.¹⁰ In doing so, Judge Spaeth wrote:

"In our opinion *Moyer* undermines *Corabi* and its progeny, in both the Pennsylvania and federal courts. Moreover, we are persuaded that the plaintiff should have the burden of proving falsity for the reasons so carefully explained by ... the Sixth Circuit in *Wilson v. Scripps-Howard Broadcasting Co.* [*supra*] ..." *Id.* at 488, 448 A. 2d at 13.

And as Judge Spaeth wrote in a footnote:

9. *Dunlap* was decided more than two years subsequent to our ruling instantly.

10. Cf. Concurring Opinion by Beck, J.

"8. One commentator has cited *Moyer* as an example of a state court's express recognition of post-*Gertz* burdens of proof:

Before 1964, truth was a 'defense' in defamation cases—which meant that falsity would be assumed unless the defendant pleaded affirmatively that his aspersion was true and then came forward at the trial with evidence of its truth. Once all the proof was in, the defendant had the burden of convincing the court that the disparagement was true. The revolution changed all this: the United States Supreme Court has, by implication, allocated an issue of falsity to the plaintiff by holding that plaintiffs have no cause of action unless they establish the defendants' fault. Public officials or public persons are required by *Times* and *Walker* to establish *Times* malice; and private persons are required by *Gertz* to establish at least negligence. These constitutional burdens requiring plaintiffs to demonstrate the defendants' fault make no sense unless the plaintiff shows that the disparagement was untrue. Statements of defamatory truth are not actionable as either libel or slander. Some state courts have expressly recognized this constitutional reallocation of the burdens on the truth issue [footnote citing *Moyer*, omitted]. *Morris on Torts* 350 (2d ed. 1980)." *Id.* at 488 n. 8, 443 A. 2d at 13 n. 8.

The Decision of the panel in *Dunlap* has twice been recently cited by the United States District Court For The Eastern District of Pennsylvania on the question of the burden of proving truth or falsity—under Pennsylvania law. While in no sense binding, and purely dictum, the Decisions should be noted.

In *Lal v. CBS, Inc.*, 551 F. Supp. 356 (E.D. Pa. 1982), Chief Judge Luongo observed in a footnote:

"During oral argument, counsel for CBS directed the court's attention to the Pennsylvania Su-

perior Court's recent decision in *Dunlap v. Philadelphia Newspapers, Inc.*, 448 A. 2d 6 (1982), wherein it was held that the burden of proving the truth of a publication may not constitutionally be placed upon a defendant in a defamation action. Hence, CBS argues under *Dunlap* that it is plaintiff's burden to prove that the broadcast was false. Although I predict that the Pennsylvania Supreme Court would reverse its prior decisions and follow *Dunlap* were it presented with the issue, I need not decide the point at this time. Irrespective of the placement of the burden of proof on the truth defense, an issue of fact would still remain as to whether the broadcast was true or false." *Id.* at 361 n. 3.

And in *Williams v. WCAU-TV*, 555 F. Supp. 198 (E.D. Pa. 1983), Judge Broderick agreed:

"Capital Cities has also asserted that summary judgment should be granted it because its broadcast was substantially true. The Court is aware of the recent decision of Judge Spaeth of the Pennsylvania Superior Court in *Dunlap v. Philadelphia Newspapers, Inc.*, 448 A. 2d 6 (Pa. Super. 1982), holding that, in light of the Supreme Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), the plaintiff in a defamation action bears the burden of showing the falsity of the publication giving rise to the action. We join with our colleague, Chief Judge Luongo, in predicting that the Pennsylvania Supreme Court will follow *Dunlap* when it is presented with the issue. *Lal v. CBS, Inc.*, 551 F. Supp. 356 at 361 n. 3 (E.D. Pa. 1982). See *Steaks Unlimited, Inc. v. Deaner* [*supra*]."

Other jurisdictions as well place the burden of proving falsity upon a libel plaintiff. See, e.g., *Cianci v. New Times Publishing Co.*, 639 F. 2d 54 (2d Cir. 1980) (public figure);

Goodrich v. Waterbury Republican-American, Inc., 188 Conn. 107, 448 A. 2d 1317 (1982) (private figure); *McIntire v. Westinghouse Broadcasting Co.*, 479 F. Supp. 808 (Mass. 1979) (public figure); *Mihalik v. Duprey*, ____ Mass. App. Ct. ____, 417 N.E. 2d 1238 (1981) (public figure); *Brown v. Beney*, 41 N.C. App. 636, 255 S.E. 2d 784 (1979) (private figure); *Mark v. Seattle Times*, 96 Wash. 2d 473, 635 P. 2d 1081 (1981) (private figure); *Sims v. Kiro, Inc.* 20 Wash. App. 229, 580 P. 2d 642 (1978) (private figure); *McHale v. Lake Charles American Press*, ____ La. App. ____, 390 So. 2d 556 (1980) (public figure).

Finally, we turn to the *Restatement (Second) Torts*, adopted and promulgated on May 19, 1976, subsequent to the Decision in *Gertz*.

Section 558 sets forth the elements of a cause of action for defamation:

“§558. Elements Stated

To create liability for defamation there must be:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher; and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” (Emphasis added).

Comment a. to Section 558 refers the reader to Section 581A with respect to the requirement of falsity. Section 581A provides:

“§581A. True Statements

One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true.”

Comments a. and b. to Section 581A state the following:

“Comment:

a. To create liability for defamation there must be publication of matter that is both defamatory and false. (See §558). There can be no recovery in defamation for a statement of fact that is true, although the statement is made for no good purpose and is inspired by ill will toward the person about whom it is published and is made solely for the purpose of harming him.

Several states have constitutional or statutory provisions to the effect that truth of a defamatory statement of fact is not a defense if the statement is published for ‘malicious motives’ or if it is not published for ‘justifiable ends’ or on a matter of public concern. There have been rulings that a provision of this type is unconstitutional, because it is in violation of the First Amendment requirements of freedom of speech and of the press, and its validity is very dubious. As to an action for violation of the right of privacy by giving unreasonable publicity to details of the private life of another, see §652D.

b. At common law the majority position has been that although the plaintiff must allege falsity in his complaint, the falsity of a defamatory communication is presumed. It has been consistently held that truth is an affirmative defense which must be raised by the defendant and on which he has the burden of proof. The practical effect of this rule has been eroded, however, by the recent Supreme Court holdings that the First Amendment to the Constitution requires a finding of fault on the part of the defendant regarding the truth or falsity of the communication. Pending further elucidation by the Supreme Court, the Institute does not purport to set forth with precision the extent to which the burden

of proof as to truth or falsity is now shifted to the plaintiff. See the Caveat to §613, and Comment j.”

Section 613 considers the burden of proof in a defamation action. The burden upon the plaintiff includes, *inter alia*, proof of the defamatory character of the communication. *Id.* at (1) (a). The burden upon the defendant is stated as follows:

“In an action for defamation the defendant has the burden of proving, when the issue is properly raised, the presence of the circumstances necessary for the existence of a privilege to publish the defamatory communication.” *Id.* at (2).

Immediately following Section 613, the Reporter, post-Gertz, notes this caveat:

“The Institute expresses no opinion on the extent to which the common law rule placing on the defendant the burden of proof to show the truth of the defamatory communication has been changed by the constitutional requirement that the plaintiff must prove defendant’s negligence or greater fault regarding the falsity of the communication.”

Lastly, Comment f. to Section 613 provides:

“f. *Defendant’s fault regarding truth or falsity.* Under the Constitution, a plaintiff cannot recover unless the defendant acted negligently, recklessly or with knowledge with regard to the falsity and defamatory character of the communication. (See §580B). The plaintiff has the burden of proving the existence of this fault on the part of the defendant. If the plaintiff is a public official or public figure he cannot recover unless the defendant knew of the falsity of the communication or acted in reckless disregard of it. (See §580A). The plaintiff has the burden of proving this knowledge or reckless disregard. The Supreme Court expressly holds that proof in this case must be with ‘convincing clarity.’ Whether the same standard

of proof is required for proof of negligence in an action by a private person has not been indicated by the Court.”

In sum, as the *Restatement (Second) Torts* makes clear, there is no cause of action for defamation unless the defamatory communication is also *false*. *Corabi* agrees at 449, 273 A. 2d at 908, but reiterates the rule at common law that as the reputation of the libel plaintiff is *presumed* to be “good,” the defamatory communication is *presumed* to be false. *Id.* at 449, 273 A. 2d at 908. In our view, and as *Wilson v. Scripps-Howard Broadcasting Co.*, *supra*, points out, *Id.* at 375-76, the presumption of falsity thus created may well permit liability without fault on the part of a media defendant. *Gertz* clearly prohibits such result. We thus decided, and remain firm in that position, that the burden of proving falsity is properly placed upon a plaintiff in a libel action against a newspaper. Nor in this aspect of the subject do we discern a distinction between public figure plaintiffs and private figure plaintiffs. To draw such distinction would, we believe, effectively distort the balance the Court struck in *Gertz* designed to accommodate the competing values at stake in defamation suits by private individuals against media defendants. *Id.* at 345-49, 94 S. Ct. at 3009-12, 41 L. Ed. 2d at 808-10.

Our interpretation of *Gertz* is, as noted, shared by three United States Circuit Courts of Appeal, two panels of the Third Circuit Court of Appeals, two justices of the Supreme Court of Pennsylvania, a panel of the Superior Court of Pennsylvania¹¹, and a number of appellate courts in sister jurisdictions. Thus, we did not find that the Decision in *Corabi* binding upon us, and for the same reasons, found 42 Pa. C.S.A. §8343 (b) (1), placing as it does the burden of proving truth upon a media defendant, unconstitutional.

11. A panel Opinion of the Superior Court, while it cannot overrule a Decision of the Supreme Court, *Commonwealth v. O’Brien*, 273 Pa. Super. 205, 417 A. 2d 236 (1979), has the force of an Opinion of the full Superior Court. *Commonwealth v. Roach*, ____ Pa. Super. ____, 453 A. 2d 1001 (1982).

(c)

Continuing their attack upon our ruling that 42 Pa. C.S.A. §8343(b)(1) is unconstitutional, the Plaintiffs contend that as the Defendants failed to follow the mandate of Pa. R.C.P. No. 235(a), they waived their right to assert the unconstitutionality of the statute in question.

Rule 235(a) provides:

"Rule 235. Notice to Attorney General. Constitutionality of Statute

(a) In any proceeding in a court subject to these rules in which an Act of Assembly is alleged to be unconstitutional and the Commonwealth is not a party, the party raising the question of constitutionality shall promptly give notice thereof by registered mail to the Attorney General of Pennsylvania together with a copy of the pleading or other portion of the record raising the issue and shall file proof of the giving of the notice. The Attorney General may intervene as a party or may be heard without the necessity of intervention. The court in its discretion may stay the proceedings pending the giving of the notice and a reasonable opportunity to the Attorney General to respond thereto. If the circumstances of the case require the court may proceed without prior notice in which event notice shall be given as soon as possible; or the court may proceed without waiting action by the Attorney General in response to a notice."

To properly consider the Plaintiffs' argument, we briefly recite the essential facts. Although the Defendants' counsel in his opening remarks to the jury, by alluding to the burden of proving falsity, may well have by implication alerted all parties to a constitutional challenge, it is clear that the Defendants directly called the constitutionality of the statute into question in the Defendants' "Points For Charge," submitted to the Court at the conclusion of the trial.

The Defendants' Proposed Points Nos. 10, 11 and 33, all request the Court to instruct the jury that the burden of proving that the publications were false was upon the Plaintiffs by a fair preponderance of the evidence. The Defendants' Amendments to their Proposed Points For Charge, in Points

Nos. 11 and 38, also request the same instruction. In contradistinction, the Plaintiffs' Proposed Jury Instructions (First Set) Nos. 28 and 29, ask the Court to instruct the jury that the burden of proving the truth of the publications was upon the Defendants.

As is thus obvious, if the Court had adopted the Defendants' Proposed Points it would have been required to act in violation of 42 Pa. C.S.A. §8343(b)(1). The trial judge determined that the conflicting Points submitted on the issue, in light of *Gertz*, and *Wilson v. Scripps-Howard*, sharply focused upon the question of whether 42 Pa. C.S.A. §8343(b)(1) was indeed constitutional. During the course of a "pre-charge" conference, the Court and counsel for the parties discussed the question and the application of Pa. R.C.P. No. 235(a) (N.T. 3541-51). The Court and counsel agreed that to defer a ruling upon the constitutional question until Rule 235(a) was complied with would be prejudicial to all parties (N.T. 3551, 3589-90). The Court thereupon ruled that the statute was unconstitutional insofar as it placed the burden of proving truth upon the Defendants and instructed the jury accordingly.

In so ruling, the Court, in the face of the Defendants' failure to comply with Rule 235(a), relied upon the following language of the Rule:

"... If the circumstances of the case require the court may proceed without prior notice in which event notice shall be given as soon as possible ..."

The Court then directed the Defendants to notify the Attorney General as soon as possible (N.T. 3590). The Court's ruling and the Final Charge to the jury both occurred on July 13, 1981. As the record reveals, the Defendants notified the Attorney General the next day, July 14, 1981, in accordance with Rule 235(a). See Proof of Notice Under Rule 235, Exhibit B, filed of record on July 21, 1981. At this writing, more than two years later, the Attorney General has neither intervened nor responded to the Defendants' notification. Notwithstanding this unchallenged recitation of the facts as gleaned from the record, the Plaintiffs insist that the Defendants' failure to timely comply with the requirements of Rule 235(a) resulted

in a waiver of the right to challenge the constitutionality of the statute. We disagree.

Neither our research nor that of the parties has revealed a decision in Pennsylvania interpreting the specific language of the Rule applied by the Court at bar, *supra*. However, 1 *Goodrich-Amram 2d* §235.1 at 390, is instructive on the subject:

"The normal rule is not inflexible. The court in which the action is pending has complete discretion in the administration of the proceedings, and may, in the unusual case, waive all or part of the normal rule. *In the special situation where a waiting period would be prejudicial, the court may permit the proceedings to go forward without any prior notice to the Attorney General and may direct that notice be given 'as soon as possible.'* The court, even if notice has been given, may permit the proceedings to go forward without waiting for the Attorney General to intervene or take any other action.

The Rule carefully avoids any definition of the conditions under which the court may exercise its discretion to waive the normal rule. It authorizes this 'if the circumstances of the case require.' Like all other grants of discretion to a judge in the court of first instance, his actions may be subject to review if he abuses his discretion." (Footnote omitted) (Emphasis added).

We are convinced that the case before us presented that "special situation" referred to in the above-cited passage. The Plaintiffs rely upon several decisions which mandate a result contrary to that reached here. In *all* such cases, however, unlike the case before us, although the constitutionality of various statutes was challenged, frequently for the first time in appellate briefs, the Attorney General was *never* notified. Such decisions, in our view, are not apposite to the case at bar.

Of more significance to us is the discussion on the subject found in *Commonwealth v. Stein*, 487 Pa. 1, 406 A. 2d 1381 (1979), where the appellant orally challenged the constitutionality of a statute in the lower court but failed to notify

the Attorney General of the challenge. The lower court failed to address the constitutional challenge and ruled adversely to the appellant. The appellant appealed the adverse ruling to the Superior Court, raised the constitutional challenge again in his appellate brief and thereupon for the first time notified the Attorney General thereof in accordance with Pa. R.C.P. No. 235(a). The Superior Court affirmed. The appellant then appealed to the Supreme Court and again notified the Attorney General. Addressing the issue, the Supreme Court said:

"The respondent next contends that petitioner's failure to notify the Attorney General of the Commonwealth of a constitutional challenge to an Act of Assembly in a proceeding in which the Commonwealth is not a party in violation of Pa. R.C.P. 235(a) pretermits our consideration of petitioner's constitutional claims. The rule requires 'prompt' notification of the Attorney General. Under the circumstances of this case in which the court below proceeded forthwith to the adjudication and disposition of the case without addressing itself to the constitutional questions presented by petitioner and where the Attorney General was duly notified of petitioner's claims on appeal of the matter to the Superior Court and to this Court, and neither sought to intervene in this matter nor to raise the issue of lack of prompt notification as a reason for his decision not to intervene, we cannot accept this as a basis for refusing to consider the same." *Id.* at 7-8, 406 A. 2d at 1384. (Footnotes omitted).

In *James v. Southeastern Pennsylvania Transportation Authority*, ____ Pa. Super. ____, 459 A. 2d 338 (1983), the appellant also challenged the constitutionality of a statute in the lower court but failed to notify the Attorney General in accordance with Pa. R.C.P. No. 235(a). Again, the lower court failed to address the constitutional issue in its opinion. The appellant appealed to the Superior Court and then notified the Attorney General. Responding to the contention that the issue

was waived for the failure to comply with Rule 235(a), the Court said:

"On appeal, the only issue raised is the constitutionality of this now-repealed statute. Notification of the constitutional challenge at this appellate level was given to the Attorney General in accordance with Pa. R.A.P. 521(a). This notification was sent on February 2, 1982 and a reply from the Attorney General's office dated March 2, 1982, states: 'If no notification is received from this Office within 30 days of the date of this letter, please assume that the Commonwealth will not be entering its appearance in these matters.' To date, more than six months after that letter, the Attorney General has not joined this case.

Usually, a rule is a rule. Rule 235, *supra*, requires that the Attorney General be notified of a constitutional challenge to a statute at the trial court level. Normally, non-compliance with this rule would mandate our quashing of this appeal. *Irrera v. SEPTA*, 231 Pa. Super. 508, 331 A. 2d 705 (1974), involved a constitutional challenge to this same statute and also involved a failure to comply with this same rule. The 'issue was deemed abandoned or waived.' *Irrera*, *supra*, at 515, 331 A. 2d at 708.

In the case before us, appellant did fail to comply with Rule 235; but he did raise the constitutional issue below, it was not addressed by the trial court, he did notify the Attorney General of the appellate proceedings, and the Attorney General did fail to enter the case.

This same configuration of facts existed in the case of *Commonwealth v. Stein*, 487 Pa. 1, 406 A. 2d 1381 (1979). There, considering those particular circumstances, Justice Nix held that the noncompliance with Rule 235 was not 'a basis for refusing to

consider the' constitutional issue. *Stein*, *supra*, at 8, 406 A. 2d at 1384.

[1] We are willingly guided by Justice Nix's thoughts on this matter, even though they are not in this case binding precedent. Under the circumstances occurring here, the noncompliance with Rule 235 is not fatal and we will address the merits of the constitutional challenge," *Id.* at —, 459 A. 2d at 340. (Footnotes omitted).

We find the same considerations discussed in *Stein* and *James* to guide us at this level. Clearly the purposes of Rule 235(a) have been served. The Attorney General was notified the day following our ruling on the constitutional question. Although more than two years have transpired, the Attorney General has not intervened and has given no indication that he intends to do so. As in *Stein* and *James*, we do not find late compliance with Rule 235(a) as a reason to have avoided addressing the constitutional issue.

As a corollary to the Plaintiffs' argument concerning Rule 235(a), they also contend that as the Defendants did not raise the question of the constitutionality of 42 Pa. C.S.A. §8343(b)(1), the Court should not have *sua sponte* "reached" for the issue, and to have done so constituted a violation of the clear mandate of *Wiegand v. Wiegand*, 461 Pa. 482, 337 A. 2d 256 (1975).

In *Wiegand*, the Superior Court reversed a Common Pleas Court order on the ground that the statute upon which the lower court based its decision was unconstitutional. In reversing the Superior Court and reinstating the lower court's order, the Supreme Court admonished, after observing that the parties had not raised the constitutional issue in either the lower court or in the Superior Court:

"The Superior Court by *sua sponte* deciding the constitutional issue exceeded its proper appellate function of deciding controversies presented to it. The court thereby unnecessarily disturbed the processes of orderly judicial decisionmaking. *Sua*

sponte consideration of issues deprives counsel of the opportunity to brief and argue the issues and the court of the benefit of counsel's advocacy. In sua sponte disposition of attacks upon the constitutionality of statutes, the attorney general is denied the opportunity of appearing and responding to the constitutional challenge. See Pa. R.Civ.P. 235(a)." *Id.* at 485, 337 A. 2d at 257.

Contrary to the Plaintiffs' contention, however, the Court at bar did not *sua sponte* reach for and decide the constitutional question. Although the Defendants did not use the language "we ask the court to declare the statute unconstitutional", they did ask the Court "not to follow it" when instructing the jury (N.T. 3545). Obviously, were the Court to have acceded to the Defendants' request without specifically declaring the statute unconstitutional, the same result would have been achieved *sub silentio*. The Plaintiffs obviously agree as reference to the following colloquy between the Court and the Plaintiffs' counsel reveals:

"The Court: They [the Defendants] are not having this court declare it unconstitutional. They are not asking that be done certainly. They are saying it should not be followed for the reason—

Mr. Surkin [Plaintiffs' counsel]: They are suggesting a specific statute, which specifically governs in this case by its terms is unconstitutional. They are not saying the court is acting unconstitutionally, but *they are raising the question of constitutionality of a statute.*

The only way this court can instruct a jury that the burden of proof of falsity is on the plaintiffs is to hold that that section of the statute is unconstitutional." (N.T. 3545) (Emphasis added).

Of similar significance, and as earlier noted, the Defendants' Proposed Points For Charge Nos. 10, 11 and 38, all place the burden of proving falsity on the Plaintiffs and the

Plaintiffs' Proposed Points For Charge Nos. 23 and 29, are directly contrary. The issue was clearly drawn during the pre-charge conference and discussed at length (N.T. 3541-52). The parties were afforded the opportunity to brief and argue the issue post-trial and did so. The Attorney General was notified. The concerns underlying the Court's decision in *Wiegand* are in no sense present here, and the Plaintiffs' reliance upon *Wiegand* is misplaced.

2

The Plaintiffs next contend that the Court's refusal to instruct the jury in accordance with the Plaintiffs' Proposed Additional Points For Charge Nos. 59 and 60, was error. Both proposed points concern the failure of the Defendants to call certain witnesses during the presentation of the defense case in chief. As the proposed points relate to several classes of witnesses, we considered them separately.

(a)

The Plaintiffs first argue that as the Defendants failed to call as a witness (1) "an editor to testify concerning the scope of editorial review given to [the allegedly defamatory articles] although [the Defendants] had an editor in the courtroom", (2) an expert to refute the Plaintiffs' damage testimony, although such an expert was also present in the courtroom, or (3) two disclosed sources, Alexander Jaffurs or Edward Hussie, the Court should have given the jury the following instruction:

"59. In producing evidence in support of their contentions, defendants did not call any editor to testify concerning the scope of the editorial review given to these articles, they did not call any witnesses concerning plaintiffs' damage presentation, and they did not call as witnesses any sources other than Richard Doran. In particular, defendants did not call as a witness either Alexander Jaffurs or Ed-

ward Hussie. The general rule is that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and without satisfactory explanation, he fails to do so, an inference may be drawn that the evidence if produced would be unfavorable to him. The failure to call an available witness possessing peculiar knowledge concerning facts essential to a party's case gives rise to an inference that the testimony of such uninterrogated witness would not sustain the contention of that party. However, the rule is not operative unless it appears to you that the absent witness has peculiar knowledge or means of knowledge rendering his testimony of importance to the party in a position to call him, and it must first appear that this knowledge exists before the rule can be invoked.

Your inquiry on this point will be: (1) Is the absent witness available, or has his absence been satisfactorily explained? (2) Does the absent witness possess peculiar knowledge or means of knowledge rendering his testimony of importance to the party in a position to call him? If the witness is available and does possess such peculiar knowledge, then the jury may infer from the fact that he was not called that if he had been produced his testimony would have been unfavorable to the party whose duty it was to call him. Laub, Trial Guide, §596."

The proposed point is, in effect, nothing more than the usual "adverse inference" or "missing witness" instruction, to be given in appropriate circumstances when a party fails to call a witness. See Pa. SSJI (Civ) 5.06.

The Supreme Court of Pennsylvania, in *Commonwealth v. Newmiller*, 487 Pa. 410, 409 A. 2d 834 (1979), quoted the Superior Court in *Commonwealth v. Birch*, 240 Pa. Super. 587, 361 A. 2d 737 (1976), upon the question of when a jury is permitted to draw an adverse inference:

"As the Superior Court stated:

"The criteria required before an inference can be drawn from the failure of a party to produce a witness are well-established. "Where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, without satisfactory explanation he fails to do so, the jury may draw an inference that it would be unfavorable to him.' *Wills v. Hardcastle*, 19 Pa. Super. 525, 529 (1902); *Green V. Brooks*, 215 Pa. 492, 496, 64 A. 672 (1906); *Hass v. Kasnot*, 371 Pa. 580, 584, 535, 92 A. 2d 171 (1952). *The person not produced must be within the power of the party to produce.* II Wigmore on Evidence, §286." *Commonwealth v. Trignani*, 185 Pa. Super. 332, 340, 138 A. 2d 215, 219, *aff'd*, 393 Pa. 140, 142 A. 2d 160 (1958) (emphasis added). In *Commonwealth v. Jones*, 445 Pa. 488, 495, 317 A. 2d 233, 237 (1974) our Supreme Court articulated the "missing witness" inference rule as follows: "[W]hen a potential witness is available to only one of the parties to a trial, and it appears this witness has special information material to the issue, and this person's testimony would not be merely cumulative, then if such party does not produce the testimony of this witness, the jury may draw an inference it would have been unfavorable. (Emphasis added.) See McCormick, Law of Evidence, 534 (1954). See also *Bentivoglio v. Ralston*, 447 Pa. 24, 288 A. 2d 745 (1972), and *Commonwealth v. Wright*, 444 Pa. 536, 282 A. 2d 323 (1971). *Commonwealth v. Moore*, 453 Pa. 302, 305, 309 A. 2d 569, 570 (1973)." (Emphasis in *Commonwealth v. Bird*.)

"The instruction in the instant case permitted the jury to draw an inference against the appellant for the failure to call Ault to the stand. On the basis of the record before us to allow such an inference to

be drawn was error. After a thorough review of the record, we are unable to find any evidence which establishes that Ault was "peculiarly within the knowledge and reach" *Bentivoglio v. Ralston*, 447 Pa. 24, 29, 288 A. 2d 745, 748 (1972) of the appellant such that the jury might be permitted to draw the inference that Ault's testimony would have been unfavorable to the appellant. Absent such evidence the criterion articulated in *Commonwealth v. Jones*, supra, that the potential witness must be "available to only one of the parties" has not been satisfied.' *Commonwealth v. Bird*, supra, at 591, 592, 361 A. 2d at 739. (Footnote omitted.)

Further, in *Bird*, the Commonwealth argued that no error was committed in giving the charge because the witness was equally available to both parties. As the Superior Court stated:

'... to the extent Ault was "equally available" to both parties, the law is clear that no inference may be drawn against either party. See *Bentivoglio v. Ralston*, supra at 29, 288 A. 2d at 748. The evidence produced at trial simply does not establish the requisite foundation for permitting the jury to draw an inference against the appellant for the failure to call Ault as a witness,' *Commonwealth v. Bird*, supra, at 592, 361 A. 2d at 740,''' *Commonwealth v. Newmiller*, supra at 419, 409 A. 2d at 838-39.

And see, *Commonwealth v. Jones*, 455 Pa. 488, 317 A. 2d 233 (1974); *Commonwealth v. Carey*, ____ Pa. Super. ____, 459 A. 2d 389 (1983) (citing cases).

Instantly, it is clear that Messrs. Jaffurs and Hussie, as well as the Defendants' editor, seated in the courtroom and obviously known to the Plaintiffs, were not "peculiarly within the knowledge and reach" of the Defendants alone, but were, rather, equally available to the Plaintiffs, as well. Thus, the instruction was properly refused as to such witnesses.

With respect to the failure of the Defendants to produce any witnesses to refute the Plaintiffs' expert testimony concerning damages, we again find that the proposed instruction was again properly refused. The burden of proving damages was upon the Plaintiffs. 42 Pa. C.S.A. §8343(a)(6). Apparently, as a matter of trial strategy, the Defendants chose to extensively cross-examine the Plaintiffs' damage expert rather than produce an expert to refute the Plaintiffs' evidence. We are unaware of any authority and the Plaintiffs have cited none, that requires the non-burdened party to produce an expert or any other witness to refute testimony upon an issue produced by the party with the burden of proof at the risk of suffering the sting of an "adverse inference" instruction.

The ultimate sanction for the failure of a defendant to produce witnesses upon the question of damages is an adverse verdict. The Plaintiffs at bar apparently suggest that when a defendant fails to produce witnesses upon any issue upon which a plaintiff has the burden of proof, a court must instruct upon the adverse inference. Such suggestion would in effect *remove* the burden of proving damages from the plaintiff and place the burden of *refuting* damages upon the defendant. As there was no burden of proof upon the Defendants on the issue of damages, the instruction was properly refused. See, *Hertz Corp. v. Hardy*, 197 Pa. Super. 466, 473, 178 A. 2d 833, 837 (1962); *Raffaele v. Andrews*, 197 Pa. Super. 368, 370, 178 A. 2d 847, 849 (1962) (both limiting the "adverse inference" rule to non-production by the party having the burden of proof); 14 P.L.E. §32; Pa. SSJI (Civ) 5.06, Subcommittee Note.

(b)

The Plaintiffs next assert that the refusal to instruct the jury upon the Plaintiffs' Proposed Point No. 60, constituted error. During the course of their trial testimony, the Defendant reporters, Ecenbarger and Lambert, continually referred to several confidential sources and when asked, refused to reveal the identities of such sources. As a result of such refusal,

the Plaintiffs presented Proposed Point For Charge No. 60, as amended. The Proposed Point follows:

"60. Under the law of Pennsylvania, members of the media have a statutory right, which defendants have chosen to exercise in this case, to refuse to identify certain sources of information upon which they claim their articles were based, at least in part. The obvious impact of defendants' exercise of that statutory right in this case has been that plaintiffs were unable to question those sources, to determine their reliability or lack of reliability, to learn from the sources themselves what it was that they told to defendants, and otherwise to fully cross-examine those sources and probe their credibility and that of the reporters who relied upon them. You the jury may consider both defendants' decision to exercise this statutory right, and the effect that it has had upon plaintiffs' presentation at this trial as described above, in reaching your verdict. In other words, it is for you to decide what inferences, if any, should be drawn from defendants' failure to identify certain sources. You may infer, as you deem appropriate, that the defendants were simply endeavoring to protect their sources, or you may infer that, if the sources had been identified, that would have enabled plaintiffs to develop evidence adverse to defendants concerning the truth of the information supplied, and the *existence*, reliability and credibility of the sources." (Emphasis added).

The Court refused to instruct the jury upon the Plaintiffs' Proposed Point upon the ground that to charge the jury in such fashion would effectively emasculate the so-called Shield Law of Pennsylvania.¹²

12. Act of 1976, July 9, P.L. 586, No. 142, §2, effective June 27, 1978, 42 Pa. C.S.A. §5942, substantially reenacting the Act of 1937, June 25, P.L. 2133, No. 433, §1, 28 P.S. §330.

In support of their Proposed Point, the Plaintiffs argue that as interpreted by the Supreme Court in *Taylor and Selby Appeals*, 412 Pa. 32, 193 A. 2d 181 (1963) (hereinafter, "*Taylor*"), "the scope of protection afforded by the Shield Law is determined by the reporter himself: any source which the reporter does not actually publish or publicly disclose shall remain confidential." *Plaintiffs' Memorandum* at 28. As a result, the Plaintiffs contend, there is no effective method of preventing abuse of the privilege afforded by the Shield Law unless the jury is instructed specifically that:

"it need not accept the reporter's assertion of the Shield Law with blind faith; that it should itself examine the reporter's claim of privilege in light of all the facts in the case; and that it may, if it felt the facts so warranted, conclude that the reporter was not really trying to protect confidential sources, but rather to use the Shield Law solely or primarily to prevent plaintiffs from challenging the existence, reliability and credibility of the sources themselves, because the reporter felt that such a challenge might succeed." *Plaintiffs' Memorandum* at 29-30.

Before we explore the tensions existing between the privilege afforded news reporters by the Shield Law, on the one hand, and the "adverse inference" instruction requested by the Plaintiffs, on the other, it should be noted that the Court twice fully instructed the jury upon the tests of credibility to be applied to the testimony of each witness, including, of course, the testimony of the reporter-witnesses (N.T. 23-26, 3812-14).¹³ Thus, the jury was, under these instructions, free to believe or disbelieve the reporters' testimony concerning the existence and reliability of confidential sources.

13. Indeed, as the Defendants suggest, application of the tests of credibility, as applied to the testimony of *all* witnesses, is the "mechanism" designed to prevent abuse of the Shield Law by a reporter. *Defendants' Memorandum* at 41-42.

We begin our analysis with the observation that the privilege accorded news reporters by the Shield Law in Pennsylvania is virtually absolute, and the policy underlying this absolute privilege is well stated in *Taylor*:

"It is a matter of widespread common and therefore of Judicial knowledge that newspapers and news media are the principal source of news concerning daily local, State, National and international events. We would be unrealistic if we did not take judicial notice of another matter of wide public knowledge and great importance, namely, that important information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public duty, bribery, corruption, conspiracy and other crimes committed or possibly committed by public officials or by powerful individuals or organizations, unless newsmen are able to *fully and completely* protect the sources of their information. It is vitally important that this public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion.

The District Attorney points out that such a construction of 'non-disclosure of source' will enable newsmen to conceal or cover up crimes. This is correct. However, we are convinced that the public welfare will be benefited more extensively and to a far greater degree by protection of all sources of disclosure of crime, conspiracy and corruption than it would be by the occasional disclosure of the sources of newspaper information concerning a crime! Furthermore, this has been the public policy in Pennsylvania in respect to various relationships since 1887. For example, a client can confess to his attorney that he has committed a crime, but the disclosure of crime cannot be given by the attorney unless the client waives his privilege; and a person can confess to his clergyman, priest, rabbi or minister of the gospel

that he or some named person has committed a crime, but the disclosure cannot be given unless the confessor waives his privilege.

In each of these cases the Legislature has declared as a matter of public policy that information concerning the crime need not be disclosed by the lawyer or clergyman, as the case may be, even though the non-disclosure protects a criminal. The Act of 1937 is a wise and salutary declaration of public policy whose spiritual father is the revered Constitutionally ordained freedom of the press. *The Act must therefore, we repeat, be liberally and broadly construed in order to carry out the clear objective and intent of the Legislature which has placed the gathering and the protection of the source of news as of greater importance to the public interest and of more value to the public welfare than the disclosure of the alleged crime or the alleged criminal.* *Id.* at 41-42. (Emphasis partly in original) (Footnotes omitted).

As is thus apparent, the Supreme Court has directed that we "liberally and broadly" construe the statutory privilege accorded newsmen to refuse to divulge the names of confidential sources—in the public interest. To instruct a jury, in the face of the Shield Law thus construed, that it might conclude that there were *no* such sources would, in our view, render the privilege a nullity.

In *Maressa v. New Jersey Monthly*, ____ N.J. ____, 445 A.2d 376 (1983), the New Jersey Supreme Court was called upon to decide whether that State's Shield Law,¹⁴ permits reporters to refuse to disclose their confidential sources in libel cases, and if it does, whether a jury may be permitted to draw an adverse inference from a reporter's failure to identify confidential sources.

It should first be noted that unlike Pennsylvania's Shield Law, the New Jersey statute specifically provides that the trier

14. N.J.S.A. §2A:34A-21.

of fact may *not* draw any adverse inference from the exercise of the privilege not to disclose confidential sources: N.J.S.A. §2A:84A-31. Rule 39. Nevertheless, the *Maressa* Court's policy determination for holding a reporter's privilege to be absolute is instructive and, we think, apposite at bar.

The *Maressa* Court first notes that "the State has created the [defamation] cause of action and hence ... it can limit, modify or perhaps take it away through the operation of testimonial privileges, absent any claim of constitutional deprivation." *Id.* at _____, 445 A.2d at 384, (citing, *Mazzella v. Philadelphia Newspapers, Inc.*, 479 F. Supp. 523 (E.D.N.Y. 1979) (applying Pennsylvania Law)).

The *Maressa* Court then elucidated its high regard for the testimonial privilege accorded reporters:

"We have sustained testimonial privileges, even at the cost of denying a party information possibly vital to his action, 'because in the particular area concerned, they are regarded as serving a more important public interest than the need for full disclosure.' *State v. Briley*, 53 N.J. at 506, 251 A.2d 442. In *Cashen v. Spann*, 66 N.J. 541, 556, 334 A.2d 8 (1975), *cert. den.* 423 U.S. 829, 96 S. Ct. 48, 46 L. Ed. 2d 46 (1975), the Court 'emphasize[d] that in civil cases in which disclosure is sought ... for the purpose of asserting claims for money damages, the interests of the State in maintaining ... confidentiality ... are entitled to a greater degree of respect.' Federal courts have also noted that plaintiffs in civil actions do not have a compelling interest in obtaining confidential information. *See e.g., Baker v. F. & F. Investment*, 470 F.2d 778, 785 (2d Cir. 1972), *cert. den.*, 411 U.S. 966, 93 S. Ct. 2147, 36 L. Ed. 2d 686 (1973); *Democratic National Committee v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973)." *Id.* at _____, 445 A.2d at 385.

In sum, *Maressa* determined that the burden placed upon a libel plaintiff by the operation of a shield law must be tolerated

as the testimonial privilege served a more important public interest than the necessity of full disclosure. The same reasoning applies at bar, as is clearly noted in *Taylor, supra*.

It must also be observed that the so-called adverse inference is a principle of evidence. *Commonwealth v. Moore*, 453 Pa. 302, 309 A.2d 569 (1973); *Steel v. Snyder*, 295 Pa. 120, 127-28, 144 A. 912, 914-15 (1929). If this evidentiary principle is permitted to operate in a libel case, in the face of the Shield Law and the broad interpretation accorded that Law in *Taylor*, we should surely be in the position of giving a reporter the protection of the Shield Law with one hand and removing it with the other. We do not subscribe to the view that *Taylor* permits such result.

Professor McCormick has also examined the question of the practical limitation on the exercise of testimonial privileges when adverse inferences are permitted to be drawn when such privileges are claimed. *McCormick on Evidence* (Cleary 2 ed. 1972) §§76, 272. McCormick first notes that the United States Supreme Court in *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), held that permitting comment upon the failure of a defendant to testify violates his Fifth Amendment privilege against self-incrimination "by making its assertion costly." *Id.* at 614, 85 S. Ct. at 1233, 14 L. Ed. at 110.

McCormick then suggests that the principle of *Griffin v. California, supra*, should be applied to testimonial privileges that are soundly based in policy. Such privileges, in McCormick's view, should be accorded the fullest protection. *Id.* at 156. The strong public policy underlying the Shield Law in Pennsylvania is clearly articulated in *Taylor*. *See also, Steaks Unlimited, Inc. v. Deaner, supra* at 279; *Mazzella v. Philadelphia Newspapers, Inc., supra* at 525, 528-29; *Hepps v. Philadelphia Newspapers, Inc., supra* at 714. Thus, the application of Professor McCormick's postulation, and the succinct holding in *Taylor* compels the conclusion that the Shield Law must prevail and that the Court did not err in refusing the Plaintiffs' requested adverse inference instruction.

In several of the allegedly defamatory articles, the Defendant reporter William Ecenbarger reported upon a decision of the Court of Common Pleas of Lancaster County and the legal proceedings in that Court involving the Plaintiffs that led to the decision. The Plaintiffs contended at trial and in their post-trial argument that Ecenbarger's reports interpreting the proceedings and the decision were incorrect and the most damaging to the Plaintiffs of several possible interpretations. At the conclusion of the trial, the Plaintiffs requested the Court to instruct the jury in accordance with Plaintiffs' Proposed Point No. 27, as follows:

"27. When a reporter undertakes to report to the public the results of a judicial proceeding the meaning of which might be unclear, the reporter does not have the right to choose from among several possible interpretations and publish only the interpretation most damaging to the plaintiffs. If he decides to proceed in this fashion, he must not only show that his interpretation was plausible, but also that it was correct. *If the interpretation chosen and reported by the reporter is not correct, that can constitute negligence on his part.*" (Emphasis added).

The Plaintiffs' contention is based upon a "rule" they perceive to have been enunciated by Justice Rehnquist in his plurality Opinion in *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976). Such "rule," the Plaintiffs contend, is to be applied in private figure libel cases in which a media defendant reports the outcome of a judicial proceeding. *Plaintiffs' Memorandum* at 32.

In their Memorandum, the Plaintiffs quote that part of Justice Rehnquist's Opinion they contend sets forth the "rule" upon which their Proposed Point is based:

"Petitioner may well argue that the meaning of the trial court's decree was unclear, but this does not license it to choose from among several conceivable

interpretations the one most damaging to respondent. Having chosen to follow this tack, petitioner must be able to establish not merely that the item reported was a conceivable or plausible interpretation of the decree, but that the item was factually correct. We believe there is ample support for the jury's conclusion, affirmed by the Supreme Court of Florida, that this was not the case. There was, therefore, sufficient basis for imposing liability upon petitioner if the constitutional limitations we announced in *Gertz* have been satisfied." *Plaintiffs' Memorandum* at 32.¹⁵

The Plaintiffs argue that Ecenbarger's interpretation of the Lancaster County proceedings as reported by him and published by the Inquirer, was the most damaging of all possible interpretations and that such interpretation was incorrect. *Plaintiffs' Memorandum* at 33. Thus, the Plaintiffs assert, the jury at bar was required to decide two issues: (1) which of several possible interpretations was correct, and (2) was Ecenbarger's interpretation the most damaging to the Plaintiffs? The Plaintiffs contend that since such issues were before the jury, Proposed Point No. 27 should have been given so as to enable the jury to understand the conclusion it might reach upon resolving the foregoing factual issues.

As is easily seen, the Plaintiffs' Proposed Point requests an instruction to the effect that the choice and publication of an interpretation of an ambiguous judicial proceeding damaging to a plaintiff may, without more, constitute negligence unless the reporter proves that the interpretation chosen and reported was correct. In our view, the Proposed Point represents a serious misperception of the law.

15. The Plaintiffs' quotation fortuitously omits the last sentence of the paragraph:

"... These are a prohibition against imposing liability without fault ... and the requirement that compensatory awards 'be supported by competent evidence concerning the injury'." *Time, Inc. v. Firestone*, *supra* at 459, 96 S. Ct. at 968, 47 L. Ed. 2d at 166.

At the outset, the Proposed Point, by requiring the reporter to prove the accuracy of his interpretation or suffer a finding of negligence, in effect asserts that falsity and negligence are one in the same and places the burden of proving freedom from both upon the reporter. Thus, the Plaintiffs again request that the burden of proving truth be placed upon the libel defendant, and again, we find this constitutionally impermissible. *See, Subpart 1, supra; Gertz, supra.*

Of similar significance, our reading of *Time, Inc. v. Firestone, supra*, belies the Plaintiffs' assertion that the "rule" allegedly announced by Justice Rehnquist was indeed a rule at all or represented a holding in the case. The paragraph cited by the Plaintiffs was merely a response to a contention advanced on appeal by Time, Inc. The Supreme Court after determining that there was sufficient evidence to support a finding that Time, Inc. had selected and published an incorrect interpretation of a judicial proceeding, noted that "the prohibition against imposing liability without fault" remained to be overcome. Thus, it is clear that selecting and publishing an incorrect interpretation of a judicial proceeding that is damaging to a plaintiff is not *alone* sufficient to impose liability and is thus not sufficient to support a finding of negligence. The Plaintiffs' Proposed Point No. 27 was properly refused.

4

In their Complaint, the Plaintiffs asserted, *inter alia*, that the Defendants acted with actual malice, and coupled this assertion with a demand for punitive damages. *Plaintiffs' Complaint*, Paras. 10, 13, 15, 23, 25, 30, 35, 40, 43, 45, 50, 53, 55. At the conclusion of the Plaintiffs' case and following argument on the issue, the Court ruled that "... no reasonable jury can find actual malice on the part of the reporter defendants, and accordingly, the issue of punitive damages is withdrawn from the jury's consideration" (N.T 3310).

As their final assertion of error, the Plaintiffs contend that the issue of punitive damages should have been submitted to the jury and not withdrawn by the Court. Underlying

the Plaintiffs' argument is the further contention that the Plaintiffs produced sufficient evidence of actual malice on the part of the Defendants to permit the jury to award the Plaintiffs punitive damages. *Plaintiffs' Memorandum* at 34-46. *See Gertz, supra* at 349-50, 94 S. Ct. at 3011-12, 41 L. Ed. 2d at 810-11.

As interesting as the Plaintiffs' final issue may be, we need not and thus do not reach it, as it will be recalled that before a court may grant a new trial upon the basis of errors made at trial, it must conclude that such errors led to an incorrect result, *Warren v. Mosites Construction Co.*, 253 Pa. Super. 395, 403, 385 A. 2d 397, 401 (1978), and it is incumbent upon the moving party to "demonstrate in what way the trial error[s] caused such incorrect result," *Nebel v. Mauk*, 434 Pa. 315, 318, 253 A. 2d 249, 251 (1969). *See also Sevich v. Commonwealth*, 434 Pa. 68, 252 A. 2d 644 (1969).

At bar, the Plaintiffs have failed to demonstrate that the failure of the Court to instruct the jury upon the issue of punitive damages could have, in any respect, *properly* affected the verdict. The jury found the Defendants not liable to the Plaintiffs following a trial at which the Plaintiffs presented full and complete evidence concerning liability and damages. The only evidence prohibited as the result of the Court withdrawing the issue of punitive damages from the jury was evidence of the Defendants' net worth. *See Feld v. Merriam*, ____ Pa. Super. ____, ____, 461 A. 2d 225, 237-38 (1983) (Collects cases). Obviously, as the jury found the Defendants not liable to the Plaintiffs, the jury never reached the issue of damages. Thus, even if the Court *had* instructed the jury upon the issue of punitive damages, such instruction would have made no difference in the result. Accordingly, the failure to instruct upon punitive damages is irrelevant, and if error, was and remains error in the abstract. *Warren v. Mosites Construction Co., supra*.¹⁶

16. We therefore inevitably conclude that the only purpose to be served by instructing the jury upon the subject of punitive damages would have been to prejudice the jury against the Defendants.

It should also be noted that in order to recover punitive damages, the Plaintiffs were required to prove "actual malice" on the part of the Defendants by clear and convincing evidence,¹⁷ *New York Times Co. v. Sullivan, supra*; *Gertz, supra*. On the other hand, to recover compensatory or "actual" damages, the Plaintiffs, as private figures, were required to prove negligence on the part of the Defendants, merely by a preponderance of the evidence. The "clear and convincing" standard is of course more burdensome and difficult to carry than the "mere preponderance" standard. The jury, by its verdict, indicated clearly that the Plaintiffs had failed to carry their "mere preponderance" burden. Certainly, if the Plaintiffs failed to carry their lesser burden, they surely could not have overcome the burden of proving actual malice by clear and convincing evidence. There was no error.

Thus finding the Plaintiffs' contentions to be without merit, we denied their Motion for a new trial.

Filed: October 24, 1983.

By the court:

17. This burden of proof is explicated in *Matter of Jackson*, 302 Pa. Super. 369, 374, 448 A. 2d 1087, 1089 (1982), quoting in part *In re Jackson*, 267 Pa. Super. 428, 431, 406 A. 2d 1116, 1118, which, in turn, quotes *LaRocca Trust*, 411 Pa. 633, 640, 192 A. 2d 409, 413 (1963).

Opinion
IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

MAURICE S. HEPPS, et al.

v.

PHILADELPHIA NEWS-
PAPERS, INC.,
WILLIAM ECENBARGER,
and WILLIAM LAMBERT

Appeal of
MAURICE S. HEPPS,
et al.

No. 18 E.D. Appeal Dkt.
1983

Appeal from the Order of the
Court of Common Pleas of
Chester County dated Febru-
ary 15, 1983, entered at No.
36 May Term, 1976

ARGUED: April 9, 1984

NIX, C. J.

FILED: DECEMBER 14, 1984

The instant civil libel action resulted from a series of five "investigative" articles appearing in *The Philadelphia Inquirer* which purported to link Maurice S. Hepps, General Programming, Inc. and a number of independent corporate entities who operated beer and beverage distributorships as franchises of General Programming, Inc. to certain named "underworld" figures and to organized crime generally. Maurice Hepps, the individual plaintiff-appellant was the principal stockholder of the corporate plaintiff-appellant, General Programming, Inc. ("General"). General owns the trademarks "Thrifty Beverage" and "Brewer's Outlet," and licenses such marks and provides management and consultation services to licensees. The remaining corporate and individual plaintiff-appellants, approximately nineteen in number, are licensees of General. As a result of these articles, the plaintiff-appellants instituted a civil action in libel against Philadelphia Newspapers, Inc., the publisher of the newspaper in question, and William Ecenbarger and William Lambert, the reporters who prepared the series of articles.

After a six-week trial, the jury returned a general verdict

in favor of defendant-appellees. Plaintiff-appellants based their challenge to the judgment rendered below upon the trial court's decision to instruct the jury that the plaintiff bears the burden of proving the falsity of the defamatory publication. This instruction was given after the trial court had ruled that 42 Pa. C.D. §8343(b)(1) was unconstitutional in that it requires the defendant in a civil libel suit to establish the truth of the defamatory publication by way of an absolute defense to the action. Plaintiff-appellants also appeal the trial court's dismissal of their claim for punitive damages. This direct appeal seeking the award of a new trial is entertained by this Court pursuant to 42 Pa. C.S. §722(7)

I.

It has long been the decisional law of this Commonwealth that truth is a complete defense to a civil action for libel, and that the burden of proving truth rests upon the defendant. *Matson v. Margiotti*, 371 Pa. 188, 88 A.2d 892 (1952); *Kilian v. Doubleday & Co., Inc.*, 367 Pa. 117, 79 A.2d 657 (1951); *Montgomery v. Dennison*, 363 Pa. 255, 69 A.2d 520 (1949); *Mulderig v. Wilkes Barre Times*, 215 Pa. 470, 64 A. 636 (1906); *Burkhart v. North American Co.*, 214 Pa. 39, 63 A. 410 (1906); *Bryant v. Pittsburgh Times*, 192 Pa. 585, 44 A. 251 (1899); *Wood v. Boyle*, 177 Pa. 620, 35 A. 853 (1896); *Collins v. Dispatch Pub. Co.*, 152 Pa. 187, 25 A. 543 (1893); *Conroy v. Pittsburgh Times*, 139 Pa. 334, 21 A. 154 (1891); *McLenahan v. Andrews*, 135 Pa. 383, 19 A. 1039 (1890); *Press Co. v. Stewart*, 119 Pa. 584, 14 A. 51 (1888); *Rowan v. DeCamp*, 96 Pa. 493 (1880); *Barr v. Moore*, 87 Pa. 385 (1878); *Burford v. Wible*, 32 Pa. 95 (1858); *Crapman v. Calder*, 14 Pa. 365 (1850); *Steinman v. McWilliams*, 6 Pa. 170 (1847). In 1953, this common law principle was codified in the Act of August 21, 1953, P.L. 1291, No. 363, §1(2)(a), 12 P.S. §1584a(b)(1) (Repealed 1978), which provided:

In an action for defamation, the defendant has the burden of proving, when the issue is properly raised;

The truth of the defamatory communication.

The provision was reenacted in the Judicial Code on July 19, 1976, effective June 27, 1978, 42 Pa. C.S. §8343(b)(1):

Burden of defendant. —In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

The truth of the defamatory communication.

* * *

Thus the section now being challenged is the codification of the decisional law as it has developed over the last century in this Commonwealth on this subject. We are now called upon to determine whether section 8343(b)(1), which places upon the defendant in a libel suit the burden of proving the truth of defamatory statements, is constitutionally infirm in view of the relatively recent interpretations of the First Amendment of the United States Constitution as expressed by the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. See, e.g., *Bose Corp. v. Consumers Union of U.S., Inc.*, — U.S. —, 80 L.Ed. 2d 502 (1984); *Wolston v. Reader's Digest Ass'n., Inc.*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Herbert v. Lando*, 441 U.S. 153 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Greenbelt Cooperative Publishing Ass'n. v. Bresler*, 398 U.S. 6 (1970); *St. Amant v. Thompson* 390 U.S. 727 (1968); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

A.

Before examining the United States Supreme Court decisions relating to the impact of the First Amendment upon this

area of the law, it is instructive to briefly review the Pennsylvania law of libel as it has developed over the years. The underlying premise concerning the character of the defamed individual is the principle that any man accused of wrong-doing is presumed innocent until proven guilty. The decisions reasoned this principle transcended the criminal law and was equally applicable to the ordinary affairs of life. *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 448-49, 273 A.2d 899, 907 (1971). *Montgomery v. Dennison*, *supra* at 263 n.2, 60 A.2d at 525 n.2. Based upon this premise we developed the rule that in actions for defamation, the general character or reputation of the plaintiff is presumed to be good. *Corabi*, *supra* at 449, 273 A.2d at 908; *Klumph v. Dunn*, 66 Pa. 141, 147 (1870); *Hartranft v. Hesser*, 34 Pa. 117, 119 (1859); *Chubb v. Gsell*, 34 Pa. 114, 116 (1859). Since the gravamen of defamation is that the words uttered or written tend to harm the reputation, a consequence of the rule presuming the good reputation of the plaintiff was a presumption of the falsity of the defamatory words. *Corabi*, *supra*; *Hartranft v. Hesser*, *supra*.

Evidentiary considerations have also been offered to justify the presumption. As noted by this Court in *Corabi*:

Moreover, it is manifestly the fair thing to place upon the defendant the burden of proving truth: *Montgomery v. Dennison*, *supra* n.2 at 263; 9 Wigmore, Evidence §2486, at 276 (3d ed. 1940). Although not invariably so, it is preferable to place the burden of proof upon the party having in form the affirmative allegation and/or upon the party who presumably has peculiar means of knowledge of the particular fact in issue: See Wigmore, Evidence §2486, *supra*. For example, in the context of libel, if the written communication accuses plaintiff of being a murderer, a burglar or a prostitute, the defendant knows precisely what particular event he is referring to and the source of his information, whereas the plaintiff, not knowing these facts, would experience

great difficulty in refuting these general charges by showing their falsity.

Id. at 450-451, 273 A.2d at 908-09 (footnotes omitted).

Particularly, where the accusation is totally general and without the specificity necessary for a response, the absence of such a presumption would force the plaintiff in the unenviable position of proving the negative. *Corabi*, *supra* at 450, 273 A.2d at 907; *Conroy v. Pittsburgh Times*, *supra* at 339, 21 A. at 156.¹

Although falsity of the defamatory words is presumed, proof of the truth of the words by the defendant is a complete and absolute defense to a civil action for libel. *Pierce v. Cities Communications, Inc.*, 576 F.2d 495, 507 cert. denied, 439 U.S. 861 (1978); *Lowenschuss v. West Publishing Co.*, 542 F.2d 180, 184 (3d Cir. 1976); *Keddie v. Pennsylvania State University*, 412 F. Supp. 1264 (M.D. Pa. 1976); *Fram v. Yellow Cab Co. of Pittsburgh*, 380 F. Supp. 1314 (W.D. Pa. 1974); *Corabi*, *supra* at 449, 273 A.2d at 907; *Schonek v. WJAC Inc.*, 436 Pa. 78, 84, 258 A.2d 504, 507 (1969); *Schnabel v. Meredith*, 378 Pa. 609, 612, 107 A.2d 860, 862 (1954); *Montgom-*

1. Another rationale offered to support the presumption of the good character or innocence of the plaintiff was the view that it would be unduly prejudicial to the defendant to permit the plaintiff to prove his general good character in the plaintiff's case-in-chief. In *Hartranft v. Hesser*, 34 Pa. 117, 119 (1859), it was stated that the plaintiff is not permitted to prove his general good character because to permit such evidence would be to take advantage of the defendant who was unapprised of its nature or to raise a collateral issue not made by the pleadings in the case. *Id.* Thus, character evidence in defamation cases follows the general rule that "In civil proceedings, evidence of character is inadmissible unless directly in issue or involved in the nature of the proceedings, and even then evidence of good character is not admissible unless and until it is attacked by evidence to the contrary, it being presumed to be good in absence of proof that it is bad." 1 G. Henry, Pennsylvania Evidence § 152 (1953) (emphasis added) citing *Costello v. Long*, 62 Pa. Super. 13, 17 (1915); *Burkhart v. North American Co.*, 214 Pa. 39, 42, 63 A.410, 411 (1906); *Clark v. North American Co.*, 203 Pa. 346 353, 53 A. 237, 239 (1902); *Chubb v. Gsell*, 34 Pa. 114, 116 (1859). See also 22 P.L.E. *Libel and Slander* § 57 (1959).

ery v. Dennison, *supra* at 264, 69 A.2d at 525; *Hartranft v. Hesser*, *supra* at 119; *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa. Super. 475, 485-86, 448 A.2d 6, 11 (1982); *Badami v. Dimson*, 226 Pa. Super. 75, 77, 310 A.2d 298, 300 (1973); Restatement (Second) of Torts § 581A, comment b, at 235-36 (1976). Under our law, since truth is an absolute defense, whether the defamatory statements were made willfully or negligently, Restatement (First) of Torts § 582 comment (a) (1938), a civil action in libel is only actionable, at least in theory, where the defamatory statement is also false.² *Rosenbloom*, *supra* at 37; *Harbridge v. Greyhound Lines, Inc.*, 294 F. Supp. 1059, 1063 (E.D. Pa. 1969); *Corabi*, *supra* at 448-49, 273 A.2d at 908; *Young v. Geiske*, 209 Pa. 515, 519, 58 A. 887, 888 (1904); *Wood v. Boyle*, *supra* at 631, 35 A. at 854; *Collins v. Dispatch Pub. Co.*, *supra* at 189-90, 25 A. at 547; *Barr v. Moore*, *supra* at 391; Restatement (First) of Torts § 558 (1938). The cause of action arises not only because the words injure the reputation of another, but also because the publication is false. The defamatory nature of the comment, regardless of how injurious to the reputation, is not alone actionable. *Rosenbloom*, *supra* at 37; *Harbridge v. Greyhound Lines, Inc.*, 294 F. Supp. 1059, 1063 (E.D. Pa. 1969); *Corabi*, *supra* at 448-49, 273 A.2d at 908; *Young v. Geiske*, *supra* at 519, 58 A. at 888; *Wood v. Boyle*, *supra* at 631, 35 A. at 853; *Collins v. Dispatch Pub. Co.*, *supra* at 189-90, 25 A. at 547; *Barr v. Moore*, *supra* at 391.

2. In *Corabi* it is stated that falsity is not an element of the civil action of libel under our law. *Id.* at 449, 273 A.2d at 908. This statement is troubling. The fact that an element is presumed and can only be overcome by affirmative evidence establishing the contrary, does not remove it as an element of the cause of action. If such was the case, there would be no need for the presumption in the first instance. See *Waugh v. Commonwealth*, 394 Pa. 166, 146 A.2d 297 (1959); *Waters v. New Amsterdam Casualty Co.*, 393 Pa. 247, 144 A.2d 354 (1958); *MacDonald v. Pennsylvania R. Co.*, 348 Pa. 558, 36 A.2d 492 (1944); *Smith v. Kingsley*, 331 Pa. 10, 200 A.11 (1938); *Watkins v. Prudential Ins. Co. of America*, 315 Pa. 497, 173 A. 644 (1934). A more accurate statement of our law is that, although falsity is an element of the cause of action, we have concluded that the burden should be placed upon the alleged defamer to establish the truth of these accusations and will presume it in the absence of proof to the contrary.

Even though false, published materials may not give rise to liability where it is privileged. The publisher of the defamatory falsehood under the traditional Pennsylvania law of defamation is not a guarantor of the truth of the materials published. However, privilege is abused if the defamatory statement is negligently published. In *Montgomery v. Philadelphia*, 392 Pa. 178, 140 A. 2d 100 (1958), it was stated that the defense of privilege in cases of defamation "rests upon the . . . idea, that conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." 392 Pa. at 181, 140 A.2d at 102, quoting W. Prosser, *Torts* § 607 (2d ed. 1955). Thus, truth was never the *only* defense to a civil libel action in Pennsylvania. This concept was clearly set out in *Diamond v. Krasnow*, 136 Pa. Super. 68, 7 A.2d 65 (1939), which stated that the immunity of a privileged communication "is an exception to the general rule that nothing short of the truth is a defense . . ." *Id.* at 76, 7 A.2d at 69, citing *Stevenson v. Morris*, 288 Pa. 405, 136 A. 234 (1927); *Hartman v. Hyman*, 287 Pa. 78, 134 A. 486 (1926); *Montgomery v. New Era Printing Co.*, 229 Pa. 165, 78 A. 85 (1910); *Mulderig v. Wilkes-Barre Times*, *supra* *McGaw v. Hamilton*, 184 Pa. 108, 39 A. 4 (1898); *Conroy v. Pittsburgh Times*, *supra*; *Russell v. Pa. Mut. Life Ins. Co.*, 118 Pa. Super. 351, 179 A. 798 (1935); *McGerary v. Leader Publish. Co.*, 52 Pa. Super. 35 (1912); *Collins v. News Co.*, 6 Pa. Super 330 (1898).

Nonetheless, tradition, evidentiary considerations, or any other state determined policy, cannot support the presumption of falsity, if it is offensive to constitutional mandate. Judge Sugerman reviewed the pertinent United States Supreme Court decisions and concluded that we are compelled to reject the rule that the defendant bears the burden of proving truth. We are unquestionably bound by the United States Supreme Court's interpretation of the provisions of the Federal Constitution. *First Pennsylvania Bank v. Lancaster County Tax Claim Bd.*, ____ Pa.____, ____ 470 A.2d 938, 941

(1983); *Commonwealth v. Ware*, 446 Pa. 52, 56, 284 A.2d 700, 702 (1971), *cert. denied*, 406 U.S. 910 (1972); *Commonwealth ex rel. Banks v. Hendricks*, 430 Pa. 575, 578, 243 A.2d 438, 439 (1968); *Commonwealth v. Robin*, 421 Pa. 70, 72, 218 A.2d 546, 546 (1966); *Carolene Products Co. v. Harter*, 329 Pa. 49, 55, 197 A. 627, 630 (1938). We will therefore review those decisions and assess Judge Sugerman's conclusions as to their impact under the facts of this case.

B.

At the outset of the discussion of the United States Supreme Court decisions, it must be remembered that the Court was attempting to define the extent of the freedom of expression provided under the First Amendment, and made applicable to the state through the Fourteenth Amendment, as it relates to civil actions for libel under state law. A subsidiary objective was the formulation of a rule that would satisfy the protection found to be constitutionally required. In the words of that Court, they were struggling "to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz, supra* at 325. Our purpose for reviewing these decisions at this time is to determine whether our rule of state libel law presuming the good reputation of the plaintiffs and setting up truth as a defense to be established by the defendant runs counter to the present interpretations of the First Amendment mandates.

In *New York Times, supra*, the Supreme Court stated that state law of civil libel "can claim no talismanic immunity from constitutional limitations." *Id.* at 269. That Court then proceeded to conclude that the central meaning of the First Amendment, enforced upon the states through the Fourteenth Amendment, required a privilege of fair comment and honest mistake of fact. The majority held that a public official is prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with

knowledge that it was false or with reckless disregard of whether it was false or not."³ *Id.* at 279-80.

In the context of criticism of public officials the Court rejected the argument that the availability of the defense of truth, where the burden of establishing it is on the defendant, satisfies the constitutional concerns involved.

Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." (citations omitted) The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

Id. at 279 (citations omitted).

Although *New York Times* made it clear that no longer would the former view that libel was speech not protected by the First Amendment be without exception, many questions were still left unanswered by that decision as to the full extent of the constitutional privilege developed therein. The *New York Times* decision did not expressly state that the constitutional protection required the shifting of the burden of proving falsity to the plaintiff in establishing a *prima facie* case. Nor did the reasoning of that decision necessarily implicitly compel such a result. See *Corabi, supra* at 468 n.22, 273 A.2d at 917 n.22. In *New York Times*, the Court had no occasion to consider the question of who should bear the burden of proving falsity when it is in fact in issue in the litigation. To the contrary, the Court in *New York Times* was concerned with

3. The *New York Times* decision was without dissent. The three concurring justices would have required an absolute, unconditional privilege to critique official conduct. *New York Times v. Sullivan*, 376 U.S. 254, 297 (1964) (Black, J. concurring, joined by Douglas, J.); *Id.* at 304-05 (Goldberg, J., concurring, joined by Douglas, J.).

stressing "[t]hat erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive." *Id.* at 271-72.⁴

The major question commanding the attention of the Court in subsequent decisions was the extent to which the *New York Times* rule should apply. In 1967, the Court extended the *New York Times* rule to public figures in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 338 U.S. 130 (1967). In those cases the plaintiffs were not public officials as was the case in *New York Times*, but rather individuals who had attracted public attention either through the positions they held in society or their activities in affairs of

4. We note that several of the decisions of that Court have stated the *New York Times* holding as requiring proof of falsity as part of the plaintiff's *prima facie* case. For instance in *Garrison v. Louisiana*, 379 U.S. 64 (1964), Justice Brennan stated:

We held in *New York Times* that a public official might be allowed the civil remedy *only if* he establishes that the utterance was false

...
Id. at 74. (emphasis added)

See also *Greenbelt Corp. Publishing Assn. v. Bresler*, 398 U.S. 6, 8 (1970); *Rosenblatt v. Baer*, 389 U.S. 75, 84 (1966).

However, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), Justice White speaking for the Court again stated that "the prevailing view is that truth is a defense." *Id.* at 489. Thus as to whether the communications intended to be covered by the *Times* rule, required proof of falsity as part of the plaintiff's *prima facie* case under the *New York Times* decision is at best unclear and debatable. Moreover, the subsequent restatement of the *Times* holding in the cited cases can arguably be classified as loose characterizations and thus not determinative of the question as to where the burden of proving falsity should lie. See *Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond*, 61 Va. L. Rev. 1349, 1383-84 (1975).

public concern.⁵ However, in *Rosenbloom, supra*, the Court was divided on whether the standard of knowing or reckless falsity applied where the alleged defamatory statements related to a private individual in a matter of public or general concern.⁶

Instant appellee concedes that up to this point the constitutional protection identified in *New York Times* had not been extended to the private citizen seeking redress for an alleged libel under state law. Thus the state could, without reference to the Constitution, assign the burden to prove truth upon the defendant in a private figure libel case. Brief of Appellees at 13. We agree with this concession and add, as previously noted, even if the constitutional protection had been found applicable, it was still unclear up to that point whether placing the burden of proving truth upon the defen-

5. At this stage of the development of the term a "public figure" is one who through fame, notoriety of achievements, or through voluntary participation in resolution of important public questions, seeks to influence society. *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976); *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 337, 342 (1974); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 154, 164 (1967); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273 (3d Cir. 1980). The characteristics of this category deemed to justify the application of the actual malice standard are that the public figure invites public attention, criticism and comment and usually has access to the media to refute any defamatory publicity. *Time, Inc., supra* at 456; *Gertz, supra* at 344; *Steaks Unlimited, supra* at 274.

6. To be distinguished from those included within the "public figure" category is the involuntary public figure. This is an individual who has not attained fame or notoriety and who is thrust into an event of general public interests involuntarily. *Times, Inc. v. Firestone*, 424 U.S. 448 (1976). Justice Brennan in *Rosenbloom v. Metromedia, Inc.* 403 U.S. 29 (1971) argued that the "malice standard" should not focus on the nature of the individual involved but rather upon whether the event is one of general public interests. See also *Gertz, supra* at 361 (Brennan, J., dissenting). The *Firestone* Court specifically rejected the Brennan view stating that such an extension would unjustifiably abridge a legitimate state interest in protecting private individuals from libelous publications. *Id.* at 454. Our decision in *Matus v. Triangle Publications, Inc.*, 445 Pa. 384, 286 A. 2d 357 (1971), *cert. denied*, 409 U.S. 856 (1972), which adopted the position of the *Rosenbloom* plurality, must therefore be overruled.

dant would have been offensive to such a Constitutional mandate. Nevertheless, appellee relies, as did Judge Sugerman, upon the Court decision in *Gertz* as the basis for the view that the First Amendment is here applicable and that placing the burden upon the defendant to prove truth runs afoul of the protection afforded free expression.

In approaching the issue in *Gertz* that the Court was unable to resolve in *Rosenbloom*, they began by recognizing that the difference between the public official and public figure on the one side and the private individual on the other warranted a different approach in the two situations. The Court expressed the belief that "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."⁷ *Gertz, supra* at 345. After acknowledging the persisting antithesis that must necessarily exist between freedom of speech and press and libel actions,⁸ the Court nevertheless concluded that "the states should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual."⁹ Acknowledging the legitimacy of the concern of the *New York Times* Court to assure the freedoms of speech and press that "breathing space" essential to their fruitful exercise, see *NAACP v. Button*, 371 U.S. 415

7. The United States Supreme Court has interpreted the First Amendment as affording private individuals a greater protection from defamation than both public officials and public figures because public figures and officials enjoy a greater opportunity to reply to libelous statements and they have also purposefully assumed a position in society which invites attention and comment. By voluntarily assuming such a role in society, public figures and officials relinquish, to a degree, their right to privacy. *Gertz, supra* at 345.

8. The Court noted that since libel is based upon the content of the speech, it limits the freedom of the publisher to express certain sentiments unless the publisher is willing to take the risk of the defense of a civil action in libel. *Gertz, supra* at 342.

9. In this context, the Court noted that the extension of the *New York Times* test proposed by the *Rosenbloom* plurality would "abridge this state interest [protecting private citizens from injury resulting from defamatory falsehood] to a degree that we find unacceptable". *Gertz, supra* at 346.

(1963), the *Gertz* Court held that "the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to the private individual" provided the state did not create a scheme that imposed liability without fault. *Gertz, supra* at 347.¹⁰

In reaching this conclusion, the *Gertz* Court stated that it believed its rule would insulate the private citizen from the stringent standard of actual malice, and yet shield the media from the rigors of strict liability.¹¹ The Court stated that it had chosen this approach "in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation." *Id.* at 348.

However, the Court found that this compelling state interest did not extend beyond compensation for actual injury.

[W]e hold that the states may not permit recovery of presumed or punitive damages, at least when lia-

10. The *Gertz* Court characterized a rule of strict liability as one which compels a publisher or broadcaster to guarantee the accuracy of his factual assertions. *Gertz, supra* at 340. The Court stated that "[a]llowing the media to avoid liability *only* by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties." *Id.* (emphasis added).

11. As a caveat to this aspect of the *Gertz* standard, the Court cautioned:

... At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substantial danger to reputation apparent." This phrase places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Cf. *Time, Inc. v. Hill*, 385 US 374 (1967). Such a case is not now before us, and we intimate no view as to its proper resolution.

Id. at 348 (emphasis added; footnote omitted).

Since, however, the defamatory character of the articles in question in this appeal was apparent, the above caveat of *Gertz* is not here applicable.

bility is not based on a showing of knowledge of falsity or reckless disregard for the truth.

Id. at 349.

The Court was of the view that the "largely uncontrolled discretion" conferred on juries in presumed damages and the invitation in these instances to juries "to punish unpopular opinion" did offend constitutionally protected free expression. Concluding that presumed damages constituted "gratuitous awards of money damages far in excess of any actual injury," *id.* at 349, the Court reasoned that the state interest in these instances was insufficient to permit recovery unless, at a minimum, at least, the *New York Times* standard is met. Following the same general reasoning as employed in the case of presumed damages, the Court reached the same result for punitive damages.

II.

A.

It is apparent from *Gertz* and the cases following it, *Herbert v. Lando*, *supra*; *Time, Inc. v. Firestone*, *supra*; that the only restraint upon the states mandated by the First Amendment in civil actions for defamatory falsehood brought by a private figure for compensatory damages is that they may not impose liability upon the defendant without fault. As early as 1939 this Court stated, in *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A. 2d 302 (1939), that liability for defamatory falsehood cannot be imposed without fault. The defendant in that case was a broadcasting company that rented its time and facilities to an advertising corporation for the transmission of a series of sponsored radio programs over one of its networks. A script for each program was prepared in advance and submitted to the broadcaster and followed exactly by the performers at rehearsals where it was approved. All participants in the program in question were employed and paid by the advertising company which had rented the time slot. When the program was over one-half

completed, one of the participants interpolated an extemporaneous remark.

The trial court found that the interjected "ad lib" was "slanderous per se" and ruled that the defendant's liability was absolute though it was without any fault. In rejecting the trial court's acceptance of a theory of strict liability, Chief Justice Kephart noted:

In Pennsylvania, the principle of liability without fault for injuries to the person has received scant consideration. The great body of our law of liability for personal injuries is that of liability through fault; liability based almost exclusively on wrongful conduct.

Id. at 187, 8 A. 2d at 304.

In discussing other areas where some states had imposed strict liability, reference was made to those jurisdictions that were then extending a theory of strict liability to publishers of newspapers for defamatory publications, the Court stated:

Considering the rule of supposedly absolute liability imposed in some jurisdictions on the publisher of a newspaper for his defamatory publications, and this is the rule here chiefly relied on, a close examination of the Pennsylvania law will show that our rule is not one of absolute liability, but rather, of a very strict standard of care to ascertain the truth of the published matter. (Citations and footnote omitted)

Id. at 192, 8 A. 2d at 307.

Thus, it would appear that long before the First Amendment considerations were raised, the common law of this jurisdiction had determined that the law of libel should require negligence or willful misconduct. See *Rosenbloom v. Metro-media, Inc.*, *supra* at 87 n.13; *Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404, 410 n.3 (E.D. Pa. 1983); *Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167, 178-81, 191 A.2d 662, 668-69 (1963); *Williams v. Kroger Grocery & Baking Co.*, 337 Pa. 17,

19, 10 A.2d 8, 9 (1940); *Wharen v. Dershuck*, 264 Pa. 562, 566, 108 A. 18, 19-20 (1919); *Clark v. North American Co.*; 203 Pa. 346, 352, 53 A. 237, 239 (1902); *Neeb v. Hope*, 111 Pa. 145, 151-52, 2 A. 568, 570-71 (1885).¹²

We are mindful that the former conditional privileges recognized under our law have lost their significance in the wake of *New York Times* and *Gertz*. If a private figure plaintiff is to maintain any cause of action at all, he must minimally establish the negligence on the part of the publisher. In so doing, "he has by that very action proved any possible conditional privilege was abused." Restatement (Second) of Torts, Topic 3, Title A, Special Note, at 259 (1977); see also *Nevada Independent Broadcasting Corp. v. Allen*, ____ Nev. ____, 664 P.2d 337, 342-343 (1983).

B.

The core of the reasoning of both the trial court and instant appellees is that the *Gertz* prohibition against strict liability necessarily requires that the plaintiff must have the burden of proving the falsity of the matter. This proposition does not logically flow, nor is it consistent with the concern sought to be addressed by the *Gertz* rule. The concept of fault as developed in the *Gertz* decision is not synonymous with the burden of proof of truth or falsity. The *Gertz* Court wished to avoid the possibility that a publisher may be held liable for defamation even though he took every conceivable precaution to ensure the accuracy of the offending statement prior to its

12. Moreover, the requirement of fault has been codified in Pennsylvania law since 1901. 42 Pa. C.S. §8344 (originally enacted in Act of April 11, 1901, P.L. 74, §3, 12 P.S. §1583) provides:

Malice or negligence necessary to support award of damages

In all civil actions for libel, no damages shall be recovered unless it is established to the satisfaction of the jury, under the direction of the court as in other cases, that the publication has been maliciously or negligently made, but where malice or negligence appears such damages may be awarded as the jury shall deem proper.

dissemination. *Id.* at 346. Under the law of this Commonwealth there is no liability for civil libel unless plaintiff can at least establish that the dissemination occurred as a result of lack of due care. 42 Pa. C.S. §8344; *Rosenbloom*, *supra* at 87 n.13; *Zerpol Corp. v. DMP Corp.*, *supra* at 410 n.3; *Purcell v. Westinghouse Broadcasting Co.*, *supra* at 178-81, 191 A.2d at 668-69; *Williams v. Kroger Grocery & Baking Co.*, *supra* at 19, 10 A.2d at 9; *Wharen v. Dershuck*, *supra* at 566, 108 A. at 19-20; *Clark v. North American Co.*, *supra* at 352, 53 A. at 239. A plaintiff, even though benefitting from the presumption of falsity, must nevertheless show that defendant acted maliciously or negligently. 42 Pa. C.S. §8344; *Rosenbloom*, *supra* at 87 n.13; *Zerpol Corp. v. DMP Corp.*, *supra* at 410 n.3; *Purcell v. Westinghouse Broadcasting Co.*, *supra* at 178-81, 191 A.2d at 668-69; *Williams v. Kroger Grocery & Baking Co.*, *supra* at 19, 10 A.2d at 9; *Wharen v. Dershuck*, *supra* at 566, 108 A. at 19-20; *Clark v. North American Co.*, *supra* at 352, 53 A. at 239. Restated, under our law the inability of the publisher to overcome the presumption of falsity of the defamatory statement will not insure recovery by the plaintiff. The recovery is dependent upon plaintiff's ability to establish malice or negligence on the part of the publisher in disseminating

the defamatory falsehood.¹³ See 42 Pa. C.S. §8343(a)(7); *Corabi*, *supra* at 452 n.10, 453, 273 A.2d at 899, n.10; *Sciandra v. Lynett*, *supra* at 601, 187 A.2d at 589; *McAndrew v. Scranton Republican Pub. Co.*, *supra* at 515, 72 A.2d at 785; *Montgomery v. Dennison*, *supra* at 262-64, 69 A.2d at 524-25.

We are satisfied that Pennsylvania law makes a constitutionally acceptable accommodation between the freedom of expression required by the First Amendment and our law of civil libel for compensatory damages brought by a private individual to redress defamatory falsehood. Strict liability is a policy determination that injury flowing from a set of circumstances will be compensable regardless of the blamelessness of the conduct of the defendant. The prohibition of *Gertz* restrains a state from attempting to protect its private citizens from defamatory falsehood causing injury to reputation by allowing compensatory damages without predicated the recovery on a showing of some wrongdoing on the part of the publisher. To assess the liability solely on the basis that the

13. In a rather circuitous argument, appellees contend that falsity is inextricably bound up with proof of fault. Appellees assert that to prove fault the plaintiff in fact must demonstrate the falsity of the matter. While in some instances the plaintiff may elect to establish the patent error in the material to demonstrate the lack of due care in ascertaining its truth, it does not necessarily follow that negligence of the defendant can only be shown by proving that the material is false. A plaintiff can demonstrate negligence in the manner in which the material was gathered, regardless of its truth or falsity. In such instance the presumption of falsity will prevail unless the defendant elects to establish the truth of the material and thereby insulate itself from liability. Where it is necessary to prove falsity to establish the negligence of the defendant, it is then the burden of the plaintiff to do so. This would appear to be a situation contemplated by former Chief Justice Roberts in his concurring opinion in *Moyer v. Phillips*, 462 Pa. 395, 404, 341 A.2d 441, 445 (1975) (Roberts, J. concurring, joined by Nix, J.). There it is suggested that "as a practical matter, the plaintiff will find it necessary to prove the falsity of the statement in order to establish the necessary element of fault; to this extent, the defendant is relieved of the burden of proving truth as a defense." *Id.* at 407-08, 341 A.2d at 447. That proposition will not, of course, hold true in all cases. Where negligence can be established without a demonstration of the falsity of the material, there is no additional obligation upon the plaintiff to prove the falsity of the material.

published defamatory utterance was erroneous would offend the "breathing space" that free debate requires. As we understand the thrust of the *Gertz* reasoning, it would not offend the principles articulated therein to place the burden of proving truth upon a defendant as long as the recovery is dependent upon the plaintiff's ability to establish the defendant's willful or negligent conduct in publishing the defamatory matter.

Our conclusion is bolstered by the fact that the *Gertz* holding adopted the view of the dissenters in *Rosenbloom*, *supra* at 64 (Harlan, J., dissenting); *id.* at 86-87 (Marshall, J., dissenting, joined by Stewart, J.), that the States are free to develop their own standards of liability for media defendants so long as they do not impose liability without fault. See *Gertz*, *supra* at 339, 347. In *Rosenbloom*, Pennsylvania libel law was under scrutiny and the dissenters were satisfied that their standards had not been violated. Although it was clear that the *Rosenbloom* Court was aware of the Pennsylvania requirement placing the burden of proving truth upon the defendant, nonetheless, neither dissenting opinion equated that allocation with strict liability. In fact, Justice Marshall plainly stated that Pennsylvania, unlike many other jurisdictions, did not apply a liability-without-fault standard. *Id.* at 87 n.13 (Marshall, J. dissenting). Moreover, the plurality which would have required the actual malice standard at no point suggested that Pennsylvania law attempted to impose liability without fault.

What the appellee is in essence arguing is that, even though the media publishes or reports maliciously or negligently a defamatory statement injurious to the reputation of a private citizen, it should be insulated from liability unless the plaintiff can affirmatively demonstrate the falsity of the statement. We find nothing in the Supreme Court decisions that would suggest such a result. The "breathing space" requirement of the First Amendment has not been extended, nor do we believe it can be reasonably extended, to condone or to encourage irresponsible conduct by the media in its exercise of informing the public of newsworthy events. Nor can we conceive of a legitimate constitutionally protected interest in

condoning the media's malicious or negligent discharge of this responsibility. Free debate will not be encouraged by allowing it to become the forum for malicious or negligent abuse of the reputation of those involved in the controversy. The right to criticize must carry some degree of responsibility, particularly where it may jeopardize the reputation of a private citizen.

We note further that a media defendant in a civil libel action is given even greater protection under our statutory law. In addition to the privilege to communicate matters of public interest and concern without fear of liability for erroneous information disseminated without negligence or malice, a newspaper publisher is privileged to withhold the identity of sources of information. The Pennsylvania Shield Law, 42 Pa. C.S. §5942(a), provides that:

(a) General rule.—*No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.*

This statute has been interpreted broadly. See, e.g., *Lal v. CBS, Inc.*, 726 F.2d 97, 100 (3d Cir. 1984); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 278 (3d Cir. 1980); *In Re Taylor*, 412 Pa. 32, 40, 193 A.2d 181, 185 (1963). There, sources are excludable whether or not they contain the identity of sources actually used by the newspaper since the identity of all persons named or implicated in these sources is also included within the protection of the "shield law". *Lal v. CBS, Inc.*, *supra*

at 100; *Steaks v. Deaner*, *supra* at 278; *In Re Taylor*, *supra* at 40, 193 A.2d at 185.¹⁴

As a consequence of this greater protection to the media defendant provided by the "shield law", the plaintiff in a civil libel action is restricted in his ability to prove the falsity of the defamatory statement. He is denied access to the sources of information on which the statement is based. The defendant, who does possess that information is therefore in a better position to prove the truth of the defamatory statement. Thus this additional protection to a media defendant and the resulting impediment imposed upon the plaintiff in seeking to establish the falsity of the statements provides a further justification for maintaining our current practice of requiring the defendant to prove truth in defense of such a suit.

C.

For the foregoing reasons we hold that in a libel suit brought by a private individual for compensatory damages resulting from the defamatory material, the presumption of falsity remains and the defendant has the option of proving truth as an absolute defense to the action. The trial court's instruction to the contrary was error and the resulting verdict cannot be allowed to stand. Since the verdict was a general one we are unable to ascertain whether the jury found for the defendants because of its conclusion that the plaintiff had failed to establish the falsity of the defamatory statements or whether the verdict reflects a finding that defendant was not negligent in publishing the material. The latter reason, of course, would have been a proper basis for the verdict, but the former reason is not in accordance with our law. Accordingly, the judgment of the trial court is reversed and a new trial is awarded as to the claim for compensatory damages.

14. It must be noted that the shield law is designed to protect the confidentiality of the source; it was never intended to be interpreted as insulating the publisher from its negligence or actual malice.

III.

Since we are remanding the cause for a new trial on compensatory damages, it is also necessary to review appellant's assertion that the trial court erred in withdrawing from the jury's consideration the punitive damage issue. The trial court ruled that the appellant had presented insufficient evidence of the reporter's "actual malice" at trial so as to raise a triable issue of fact. We agree.

We should note that the *Gertz* decision has raised considerable controversy concerning whether it foreshadows the total abolition of punitive damage rewards in defamation cases.¹⁵ In holding unconstitutional the awarding of presumed or punitive damages where defamatory publications are negligently published, the *Gertz* Court reasoned that the potential for large jury verdicts, completely unrelated to the actual injury suffered by the victim, might have a chilling effect or act as a prior restraint of free expression. *Gertz, supra* at 350-51. Further, the Court surmised that the doctrine of presumed damages and the unabridged discretion conferred upon juries to award punitive damages, bearing no relationship to the injury suffered, invites juries to punish the expression of unpopular opinion rather than effectuate any legitimate social goal. *Id.* at 350-51. Nonetheless, a number of courts have considered whether *Gertz* presaged the abolition

15. Some commentators believe that *Gertz* indicates the United States Supreme Court will ultimately abolish punitive damage in defamation cases. See, e.g., Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex. L. Rev. 199, 215 (1976); Comment, 28 Vand. L. Rev. 887, 897 (1975).

Other commentators have concluded that *Gertz* did not in itself abolish punitive damages but merely limited their availability. See; e.g., Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 Rut.-Cam. L. J. 471, 507 (1975); Comment, 6 Loyola University Law J. 256, 267 (1975).

of punitive damages and have concluded that it did not.¹⁶ We are satisfied that under the present law as articulated by the United States Supreme Court there has not been a sufficiently definitive directive to cause us to abandon the long standing practice in this jurisdiction of allowing punitive damages in the appropriate case.

The *Gertz* decision did make it clear that the negligent standard of fault would not be a sufficient basis for the allowance of punitive damages. To justify punitive damages, the plaintiff is called upon to satisfy the "actual malice" test. *Gertz v. Robert Welch, Inc.*, *supra* at 350; *Levine v. CMP Publications, Inc.*, 738 F.2d 660, 674 (5th Cir. 1984); *Braun v. Flynt*, 726 F.2d 245, 256 (5th Cir.), *cert. denied*, ____ U.S. ____, 105 S. Ct. 252 (1984); *Hunt v. Liberty Lobby*, 720 F.2d 631, 650 (11th Cir. 1983); *Golden Bear Distributing Systems of Texas, Inc.*, 708 F.2d 944, 947 (5th Cir. 1983); *Maheu v. Hughes Tool Co.* 569 F.2d 459, 479 (9th Cir. 1977); *Appleyard v. Transamerican Press, Inc.*, 539 F.2d 1026, 1030 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Buckley v. Littell*, 539 F.2d 882, 897 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Carson v. Allied News Co.*, 529 F.2d 206, 214 (7th Cir. 1976); *Davis v. Schuchat*, 166 U.S. App. D.C. 351, 357, 510 F.2d 731, 737 (1975). We therefore turn to the question as to whether, upon this record, the trial court was correct in concluding that the evidence was insufficient to establish "actual malice". After a thorough review of the record, we are satisfied that the trial court's decision in this regard was correct.

16. *Hunt v. Liberty Lobby*, 720 F.2d 631 (11th Cir. 1983); *Maheu v. Hughes Tool Co.*, 569 F.2d 459 (9th Cir. 1977); *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976); *Appleyard v. Transamerican Press, Inc.*, 539 F.2d 1026 (4th Cir. 1976); *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976); *Davis v. Schuchat*, 510 F.2d 731 (D.C. Cir., 1975); *Selby v. Savard*, 137 Ariz. 222, 655 P.2d 342 (1982); *Roemer v. Retail Credit Co.*, 44 Cal. App. 3d 926, 932, 119 Cal. Rptr. 82, 85 (1975); *Fopay v. Noveroski*, 31 Ill. App. 3d 182, 198, 334 N.E. 2d 79, 92 (1975); *Embrey v. Holly*, ____ Md. ____, 442 A.2d 966 (1982); *Newspaper Publishing Corp. v. Burke*, 216 Va. 867, 224 S.E.2d 132, 136 (1976) *Calero v. Del Chemical Corp.*, 68 Wis. 2d 737, 228 N.W.2d 737, 747 (1975).

In assessing the propriety of the trial court's withdrawal of the issue from the jury, we are mindful that such a ruling should be entered only in a clear case. *Hefferman v. Rosser*, 419 Pa. 550, 215 A.2d 655 (1966); *Howard Express Co. v. Wile*, 64 Pa. 201 (1870). The publisher's hatred, spite, hostility or deliberate intention to harm the plaintiff is not sufficiently probative of his knowledge of falsity or awareness of probable falsity so as to allow its admissibility where "actual malice" is at issue, but once established, the elements heretofore enumerated would be admissible. Cf. *Greenbelt Coop. Publishing Ass'n v. Bressler*, *supra* at 10-11. As has been suggested, such testimony would invite a jury to improperly find a defendant liable where he acted with a guilty heart rather than a guilty mind. Also, it is axiomatic that a publisher's failure to investigate in itself is insufficient to establish "actual malice," *St. Amant v. Thompson*, *supra* at 732-33; *New York Times Co. v. Sullivan*, *supra* at 287-88; *Hunt v. Liberty Lobby*, *supra* at 643; *Brewer v. Memphis Publishing Co., Inc.*, 626 F.2d 1238, 1258 n.26 (5th Cir., 1975); *New York Times v. Conner*, 355 F.2d 567, 577 (5th Cir. 1966). So too, errors of judgment or interpretation as opposed to errors of historical fact have been held to be insufficient to create a jury issue of "actual malice." *Time v. Pape*, 401 U.S. 279, 290 (1971).

"Actual malice" can be established either by proving the publication was made with the knowledge of the falsity of its content or with reckless disregard of whether it was false or not. *Rosenblatt v. Baer*, 384 U.S. 75, 84 (1966); *New York Times Co. v. Sullivan*, *supra*. When the first alternative is relied upon, the plaintiff must show not only the falsity of the statement but, in addition, it is the plaintiff's responsibility to establish the defendant's knowledge of that falsity at the time of publication.

In this context it must be noted that the presumption of falsity available to the plaintiff where the negligent standard is applicable is of no assistance in meeting the burden of proving "actual malice" under this theory. The Supreme Court has made it clear that a presumption may not be used to satisfy the fault element of the cause of action. It is also to be noted

that under our traditional law such an approach would not be allowed. We have long recognized the evidentiary principle that a presumption may not be built upon a presumption. *Collins v. Hand*, 431 Pa. 378, 246 A.2d 398 (1968); *Auerbach v. Philadelphia Transportation Co.*, 421 Pa. 594, 221 A.2d 163 (1966); *Neely v. The Provident Life and Accident Insurance Co.*, 322 Pa. 417, 185 A. 784 (1936); *Philadelphia City Passenger Railway Co. v. Henrice*, 92 Pa. 431 (1880); *Douglas v. Mitchell's Executor*, 35 Pa. 440 (1860). In this instance it would require presuming not only that the content was false, but also that the defendant at the time of publication knew of that falsity. This is the clearest type of double presumption that we have rejected. Cf. *Collins v. Hand*, *supra*; *Auerbach v. Philadelphia Transportation Co.*, *supra*.

In the instant matter there was no basis for the jury to have concluded that the publication was made with the knowledge of the falsity of its content. While the plaintiff attempted to show that the dissemination was made with reckless disregard of the truth of its content, it is equally apparent that a jury issue was not created under the clear and convincing test required for such an award of damages. *Bose Corp. v. Consumers Union of U.S., Inc.*, *supra* at n.30, 85 L. Ed. 2d at 526 n.30; *Gertz v. Robert Welch, Inc.*, *supra* at 342; *St. Amant v. Thompson*, *supra* 731; *Garrison v. Louisiana*, *supra* at 74; *New York Times v. Sullivan*, *supra* at 280; *Levine v. CMP Publications, Inc.*, *supra* at 674; *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 538 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983); W. Prosser, *Torts* 771-772, 821 (4th ed. 1971). Thus the trial court properly withdrew that question from the jury's consideration. *Hefferman v. Rosser*, 419 Pa. 550, 215 A.2d 655 (1966); *Thomas v. Tomay*, 413 Pa. 270, 196 A.2d 740 (1964); *Greet v. Arned Corp.*, 412 Pa. 292, 194 A.2d 343 (1963); *Luterman v. Philadelphia*, 396 Pa. 301, 152 A.2d 464 (1959); *Miller v. Montgomery*, 397 Pa. 94, 152 A.2d 757 (1959); *Hepler v. Hammond*, 363 Pa. 355, 69 A.2d 95 (1949).

IV.

Accordingly, the order of the trial court is reversed and a new trial is awarded. The new trial will be confined to a determination of defendant's liability and the assessment of compensatory damages if the liability issue is decided in favor of the plaintiff.

Mr. Justices Larsen and McDermott did not participate in the consideration and decision of this case.

Judgment**SUPREME COURT OF PENNSYLVANIA**

Eastern District

MAURICE S. HEPPS, et al.,
Appellants

v.

PHILADELPHIA
NEWSPAPERS, INC.,
et al.No. 18 E.D. Appeal Docket
1983(C.P. Chester, Civil Action-
Law, No. 36 May Term,
1976)

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the trial court is reversed and a new trial is awarded. The new trial will be confined to a determination of defendant's liability and the assessment of compensatory damages if the liability issue is decided in favor of the plaintiff.

BY THE COURT:

 Marlene F. Lachman, Esq.
Prothonotary

Dated: December 14, 1984

(4)

Supreme Court, U.S.
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No. 84-1491

**In the Supreme Court
of the United States**

OCTOBER TERM, 1984

PHILADELPHIA NEWSPAPERS, INC., *et al.*,

Appellants,

v.

MAURICE S. HEPPS, *et al.*,

Appellees.

On Appeal from the Supreme Court
of Pennsylvania

BRIEF FOR APPELLANTS

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492

QUESTIONS PRESENTED FOR REVIEW

A.

Did the Supreme Court of Pennsylvania err in upholding the constitutionality of a Pennsylvania statute which requires a defendant publisher to bear the burden of proving the truth of its publication as a defense to a private figure defamation action?

B.

Can a private figure libel plaintiff recover damages from a newspaper defendant without proving the falsity of the complained-of publication?

C.

Can the falsity of a publication constitutionally be *presumed* solely from the defamatory character of the words used?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the courts below were as follows:

Appellants (defendants below):

Philadelphia Newspapers, Inc.*
William Ecenbarger
William Lambert

Appellees (plaintiffs below):

Maurice S. Hepps
General Programming, Inc.
A. David Fried, Inc.
Brookhaven Beverage Distributors, Inc.
Busy Bee Beverage Co.
ALMIK, Inc.
Lackawanna Beverage Distributors
N.F.O., Inc.
Elemar, Inc.

*Philadelphia Newspapers, Inc. is a subsidiary of Knight-Ridder Newspapers, Inc., the stock of which is publicly owned and traded.

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (Jt. App. 155) is reported at ____ Pa.____, 485 A.2d 374 (1984).

The opinion of the Court of Common Pleas of Chester County (Jt. App. 108) is not reported. An earlier opinion of the Court of Common Pleas, dealing with pretrial discovery matters, is reported at 3 Pa. D&C3d 693 (Chester Cty. C.P. 1977).

JURISDICTION

The judgment of the Supreme Court of Pennsylvania (Jt. App. 181) was entered on December 14, 1984. The notice of appeal to this Court was filed on March 14, 1985. Probable jurisdiction was noted on June 24, 1985. The jurisdiction of this Court rests upon 28 U.S.C. §1257(2), in that there is

drawn into question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States, and the decision of the highest state tribunal was in favor of the statute's validity.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment I:
"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."
2. United States Constitution, Amendment XIV, §1:
". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."
3. Pennsylvania Consolidated Statutes, 42 Pa.C.S.A. §8343, Act of July 9, 1976, P.L. 586, No. 142 §2:

§8343. BURDEN OF PROOF

(a) *Burden of Plaintiff.* In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

- (1) The defamatory character of the communication.
- (2) Its publication by the defendant.
- (3) Its application to the plaintiff.
- (4) The understanding by the recipient of its defamatory meaning.
- (5) The understanding by the recipient of it as intended to be applied to the plaintiff.
- (6) Special harm resulting to the plaintiff from its publication.
- (7) Abuse of a conditionally privileged occasion.

(b) *Burden of defendant.* In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

- (1) The truth of the defamatory communication.
- (2) The privileged character of the occasion on which it was published.
- (3) The character of the subject matter of defamatory comment as of public concern.

STATEMENT OF THE CASE

A. Procedural History

This action for libel was instituted in May 1976 in the Court of Common Pleas of Chester County, Pennsylvania. Plaintiffs were Maurice S. Hepps, principal stockholder of General Programming, Inc. ("General"), General, and a number of independent corporate entities which operated beer and beverage distributorships as franchisees of General. Plaintiffs-appellees (hereafter, plaintiffs) complained of a series of articles published in *The Philadelphia Inquirer*. Suit was brought against defendants-appellants (hereafter, defendants) Philadelphia Newspapers, Inc., the publisher of *The Philadelphia Inquirer*, and two reporters for *The Inquirer*, William Ecenbarger and William Lambert.

Although the articles in suit concerned plaintiffs' involvement with, *inter alia*, high-ranking officials of the Commonwealth of Pennsylvania and alleged members of organized crime, the trial court, in a pretrial order denying defendants' Motion for Summary Judgment, ruled that plaintiffs were "private figures" who could recover for defamation upon a showing of mere negligence. (Jt. App. 58).

Trial commenced on June 8, 1981 and consumed almost six weeks. Plaintiffs had expressly alleged the falsity of defendants' articles in their Complaint (Jt. App. 15, 17, 18, 20, 22), and their counsel argued falsity vehemently and repeatedly in his opening remarks to the jury. (Tr. 5-8, 11-12). Regarding the single accusation which was the focus of the trial—that plaintiffs "had some kind of implied relationship with people involved with the Mafia" (Tr. 6)—counsel for plaintiffs told the jury: "Again, this will be shown to you, in our submission, to be a charge that is totally, dastardly false. . . ." (*Ibid.*).

In their Proposed Points for Charge, defendants requested that the trial court instruct the jury that the burden was on the plaintiffs to prove that the challenged publications were false. (Jt. App. 94). Plaintiffs requested that the trial court instruct the jury to the contrary (Jt. App. 91), a position supported by 42 Pa.C.S.A. §8343(b)(1), the Pennsylvania stat-

ute which places the burden of proving the truth of a challenged publication on the libel defendant.

After hearing extensive oral argument during a "pre-charge" conference, the trial court concluded that federal law required a charge to the jury that the burden of proof rested with plaintiffs. (Tr. 3589). The trial court accordingly instructed the jury that plaintiffs bore the burden of proving, by a preponderance of the evidence, that the articles were false. (Jt. App. 99).

On July 13, 1981, the jury returned a general verdict in favor of defendants. A timely Motion for New Trial challenged, *inter alia*, the court's refusal to follow the Pennsylvania "burden of proof" statute. The Motion for a New Trial was denied, and final judgment was entered on February 15, 1983. The trial court's extensive opinion held, *inter alia*, that the common law rule embodied in Pennsylvania's burden of proof statute, which places the burden of proving the truth of a publication on the defamation defendant, violates the First Amendment to the United States Constitution. (Jt. App. 131).

Plaintiffs filed a direct appeal to the Pennsylvania Supreme Court, pursuant to a statute permitting such appeal where a trial court of general jurisdiction has held a Pennsylvania statute invalid as repugnant to the Constitution of the United States. 42 Pa.C.S.A. §722(7). In vacating the judgment in favor of defendants and remanding for a new trial, the Supreme Court upheld the validity of the Pennsylvania statute imposing the burden of proving the truth of a publication on the defamation defendant. It rejected the argument that the First Amendment requires a different result, holding instead that "the presumption of falsity remains and the defendant has the option of proving truth as an absolute defense to the action." (Jt. App. 175).

B. Facts

1. Background

In the early 1960s, Maurice S. Hepps, the lead plaintiff in this action, developed a new concept for selling beer in the Commonwealth of Pennsylvania. Rather than making sales

from a warehouse or by delivery to customers, Hepps opened large, supermarket-style, self-service stores in shopping malls. (Tr. 2099-2108). Thereafter, he began to franchise "Thrifty Beverage" distributorships through a series of management agreements. (Tr. 2108).

Hepps' concept enjoyed commercial success, but was threatened by a bill, introduced in the Pennsylvania Legislature, which would have had an adverse impact on the stores' purchasing practices. (Tr. 2130). At this point, Hepps and William Paulosky, president of the parent corporation which controlled the Thrifty operation (Tr. 2695), contacted a legislative lobbyist named Joseph Scalleat, a long-time friend of Paulosky. (Tr. 2687). Scalleat had been identified by the Pennsylvania Crime Commission as a leader of the Cosa Nostra in northeastern Pennsylvania and a member of the Bufalino crime family. (Defendants' Exhibit 7, at p. 53, Tr. 1632, 1955-1956).

Scalleat was asked to contact an influential State Senator named Frank Mazzei for help; he did, asking the Senator to pay "closer attention" to Hepps' wishes. (Tr. 2703). Although the reasons have been disputed, Senator Mazzei did oppose the bill, which never passed. (Tr. 2155-2157).

In 1972, the Liquor Control Board ("LCB"), which regulates the sale of alcoholic beverages in Pennsylvania, issued citations against three Thrifty outlets, alleging that the management agreements violated the Liquor Code. (Tr. 1968-1969). After a hearing, the LCB suspended the stores' licenses until the outlets complied with the terms of its order. (Tr. 1969). Thrifty appealed; after the order was upheld, *In re Thrifty Beverage Distributor License*, 64 Lanc. L.Rev. 83 (Lancaster Cty. C.P. 1973), Thrifty appealed to Pennsylvania Commonwealth Court. (Tr. 1971).

While the second appeal was pending, Hepps once again called upon Senator Mazzei for assistance. This time, at Hepps' request, Senator Mazzei contacted the Governor's office and arranged for a meeting between Hepps and LCB Chief Counsel Alexander Jaffurs (Tr. 2158, 2231), a meeting which Jaffurs previously had refused to attend. (Tr. 2231).

Subsequently, the Governor fired Jaffurs. Although the reasons for the firing have been the subject of dispute, Jaffurs later told *The Inquirer* he believed his prosecution of the LCB charges against Thrifty played a role. (Tr. June 16, 1981, pp. 50, 80; see also, Tr. 1594). What is undisputed is that the man who replaced Jaffurs, Harry Bowytz, was recommended to the Governor by Senator Mazzei. (Tr. 3188).

During Bowytz' term, Thrifty settled its dispute with LCB and was permitted to continue operating in substantially the same way. (Tr. 1752-1754). The license suspensions for the three outlets were lifted and replaced with a fine of \$1,000 per store. (Tr. 2236). Based on the agreement, Thrifty's appeal to Commonwealth Court was dismissed. (Tr. 1972).

2. The articles at issue

Against this background, the first of the five articles at issue here was published in *The Philadelphia Inquirer* on May 5, 1975. (Jt. App. 60). Briefly, this article reported that Senator Mazzei, later convicted of extortion in an unrelated matter, had intervened on behalf of Thrifty with the administration of then-Governor Milton Shapp during LCB proceedings against the Thrifty stores. Mazzei also recommended that a close friend be appointed by the governor as chief counsel of the LCB. Under the stewardship of Mazzei's nominee, the LCB's position in the cases changed markedly to Thrifty's benefit, even though the LCB's original position had been upheld on the first appeal. The article concluded by noting Senator Mazzei's "underworld associations," including Joseph Scalleat.¹

1. The article also reported that the wife of Joseph Scalleat was the licensee of the chain's store in Bucks County. In fact, the distributor was Scalleat's sister-in-law, and *The Inquirer* published a correction two days later. (Jt. App. 63).

In addition, the headlines on the carryover page of some editions of the May 5 article read "State Senator Used Political Muscle to Assist Business," while other editions read "State Senator Used Political Muscle to Aid His Business." There was no evidence that Senator Mazzei had any financial interest in the business.

Several months later, on September 15, 1975, *The Inquirer* reported that federal authorities investigating the Thrifty chain had found connections between it and underworld figures. (Jt. App. 64). On January 16, 1976, the third article in suit (Jt. App. 68), reported that a federal grand jury was investigating:

- (a) the alleged relationship between the plaintiffs' chain and known Mafia figures in eastern Pennsylvania;
- (b) whether the chain had received special treatment from the Shapp Administration and the LCB; and
- (c) a possible connection between the chain and small insurance companies controlled by organized crime.

On February 5, 1976, *The Inquirer* reported that a federal grand jury was investigating ties between the Thrifty chain and Wisconsin Surety Co., which the Wisconsin Insurance Department had forced into liquidation to prevent its takeover by Michael Grasso, an identified organized crime figure in southeastern Pennsylvania, and Morton Hulse, a Thrifty stockholder and insurance underwriter. (Jt. App. 71). The article also reported that federal agents had found evidence of direct financial involvement in Thrifty by Joseph Scalleat. (*Ibid.*)

Finally, on May 2, 1976, *The Inquirer* published a lengthy article which mentioned that the Wisconsin Surety Co., the target of the aborted takeover by Grasso and Hulse, had been linked to the Thrifty chain, which in turn had connections with organized crime. (Jt. App. 74).

Plaintiffs contended in their complaint that the articles were false in stating or implying that Senator Mazzei and certain members of the "Cosa Nostra" had hidden ties to Thrifty's operation and that they used improper political influence to gain favorable governmental treatment for the Thrifty chain. (Jt. App. 15-22). Plaintiff Hepps asserted that the articles damaged his personal reputation, ascribed to him characteristics incompatible with the proper conduct of his business, and injured him in his business. (Jt. App. 15). The re-

maining plaintiffs asserted that the allegedly false statements injured their reputations with lenders, suppliers and customers, ascribed to them characteristics of dishonesty, and otherwise damaged their businesses. (Jt. App. 16). Hepps testified at trial that the "thrust" of the articles was that he was "part of the Mafia" and that, through him and his associations, Thrifty was "connected to the Mafia." (Tr. 2120-2121).

3. Defendants' evidence as to truth

Testifying as on cross-examination during plaintiff's case, reporter William Ecenbarger explained the basis for his conclusion that improper political influence was used by Thrifty. He then testified to all the facts which led him to conclude there was a link between the Thrifty chain and organized crime. (Tr. 1668-1681). These facts were summarized on a chart introduced into evidence, which was the subject of extensive testimony by both the reporter and Hepps. (Jt. App. 59). The reporter testified to facts demonstrating a relationship between Thrifty and "underworld" figures Joseph Scalleat,² Albert Scalleat, Sr.,³ Louis Crocco,⁴ and Morton Hulse, the insurance broker and associate of Grasso⁵ and Ralph Puppo.⁶ In essence, the relationship between Thrifty and organized crime was as follows: William Paulosky, president of General Programming, Inc., a holding company for the Thrifty chain, had a long association with Joseph Scalleat (Tr. 2687), an organized crime figure (Tr. 1632, 1955-1956) who acted as a legislative lobbyist for the Bufalino crime fam-

2. Identified by the FBI as the lobbyist for the Bufalino crime family (Tr. 1671) and by the Pennsylvania Crime Commission as a member of the Bufalino family. (Defendant's Exhibit 7, at p. 53, Tr. 1632, 1955-1956).

3. Identified by the FBI as a member of the Bufalino crime family. (Defendants' Exhibit 13, Tr. 1658-1659, 1955-1956).

4. Identified by the Pennsylvania Crime Commission as the central figure in sports bookmaking in Johnstown, Pennsylvania. (Tr. 1677-1681; Defendants' Exhibit 20, Tr. 1680, 1955-1956).

5. Identified as a major figure in the underworld in Miami and Philadelphia and the nephew of Angelo Bruno, the late head of organized crime in Philadelphia. (Tr. 1674).

6. Identified as the brother-in-law of Angelo Bruno. (Tr. 1674).

ily. (Tr. 1671). Paulosky successfully enlisted Scalleat's aid in dealing with Senator Mazzei (Tr. 3702, 2231), with whom he had a "very close" relationship. (Tr. 1670).

Thereafter, Mazzei became very interested in Thrifty, helping it repeatedly over the years. (Tr. 1671). Joseph Scalleat had direct financial ties to Thrifty. He appeared on the payroll of Beer Sales Consultants (Tr. 1622), a corporation operated by relatives of Paulosky, and was paid "large amounts." (*Ibid.*). Beer Sales Consultants, in turn, received consulting fees from several stores in the Thrifty chain. (Tr. 1613-1614; 1628-1629; Defendants' Exhibit 4, Tr. 1614, 1955-1956). One of the stores was owned by Rose Scalleat, sister-in-law of Joseph Scalleat (Tr. 1676), while another employed Albert Scalleat, Sr. (Tr. 1677), also identified as a member of the Bufalino crime family. A third store was owned by the wife of Crocco, identified as a major figure in bookmaking operations.

Paulosky himself was named as an unindicted co-conspirator with Hulse and two well-known underworld figures (Tr. 1674-1675), in a scheme to defraud an insurance company. The indictment was brought pursuant to provisions of the Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C. §1962, *et. seq.* (Tr. 1674), designed to combat the infiltration of business by organized crime. (Tr. 1675). Hulse was a shareholder in General Programming, Inc., and was doing business with several Thrifty stores and outlets. (Tr. 1676).

The former United States Attorney for the Western District of Pennsylvania, who successfully prosecuted Senator Mazzei on unrelated charges, advised reporter Ecenbarger that federal investigators were looking into Senator Mazzei's relationship with Joseph Scalleat and the Thrifty chain (Tr. 1657-1658), and federal sources advised that a grand jury was investigating Thrifty's relationship with known organized crime figures. (Tr. 1662, 1666). Ecenbarger was later able to document the existence of the grand jury investigation. (Defendants' Exhibits 26 and 27, Tr. 1702, 1955-1956).

In addition to these specific facts, Ecenbarger was informed by federal investigators of the impetus for Thrifty's having involved itself with organized crime figures. The investigators' view was that, because the Thrifty chain was in violation of the Liquor Code from its inception, its principals knew they would need special help in having the operation approved by state government and to that end enlisted Joseph Scalleat. Scalleat worked through Senator Mazzei, succeeded in getting the form of operation approved, and then expected compensation for his services. This compensation, according to the investigators, was accomplished through payments made to Beer Sales Consultants. (Tr. 1698-1699).

4. Plaintiffs' evidence as to falsity

Throughout the six-week trial, plaintiffs attempted to demonstrate the falsity of the articles as well as the information relied upon by *The Inquirer*.

The two *Inquirer* reporters responsible for preparation of the articles at issue were questioned thoroughly over 10 days not only about the propriety of their conduct (fault), but about the factual basis for virtually every statement in the articles as well. Inconsistencies were pointed out and the alleged bias of a principal source, the former chief counsel to the Pennsylvania Liquor Control Board, was stressed. Thereafter, plaintiffs introduced two fact witnesses in an effort to demonstrate that *The Inquirer's* account of the LCB proceedings, and the alleged implication that political pressure was used to secure a favorable result, were false. (Tr. 1960-2071, 2414-2470).

With regard to the "Mafia" charge, plaintiffs introduced two other witnesses. The first, Albert Scalleat, Jr., testified that the initial article in suit was false when it reported that Joseph Scalleat's wife had a financial interest in his store. (Tr. 158). Scalleat also testified that his uncle, Joseph Scalleat, had no underworld connections. (Tr. 160). Second, William Paulosky testified to his long friendship with Joseph Scalleat, and stated that Scalleat's only connection with his company was as a salesman of mining equipment. (Tr. 2687-2689). Paulosky denied any knowledge of Joseph or Albert Scalleat's

alleged underworld connections (Tr. 2689, 2690), and testified that he did not even know two of the alleged organized crime figures with whom the defense had associated his name. (Tr. 2726). Paulosky also detailed how he participated, in his view legitimately, in the legislative process by seeking Joseph Scalleat's assistance in securing an introduction to State Senator Mazzei. (Tr. 2701-2703).

Finally, and most importantly, plaintiff Maurice Hepps testified at great length concerning the accuracy of the articles. After being asked generally about the "thrust" of the articles and the falsity of any alleged tie to organized crime (Tr. 2120-2121), Hepps detailed each alleged falsehood in the articles and offered his version of the truth. (Tr. 2221-2290). With respect to the first article alone (Jt. App. 60), Hepps identified at least 15 alleged errors. (Tr. 2221-2252). In each of these instances, Hepps placed the allegation in context, denied the accuracy of the accusation and then offered his version of the truth, often accompanied by documentation. (*Ibid.*)

For example, with regard to allegations of involvement with underworld figures, Hepps denied not only the published allegations but each of the other facts relied on by defendants. He denied that the chart (Jt. App. 59) used by the defense was accurate (Tr. 2217-2221), detailed his involvement with Joseph Scalleat and Senator Mazzei, concluding that they should not have been on the chart (Tr. 2217), and indicated that he had never heard of others listed on the chart of underworld connections. (Tr. 2217-2221). Finally, Hepps introduced testimony that he had made inquiries about Joseph Scalleat and had been informed by the United States Attorney for the Eastern District of Pennsylvania that, despite what the Pennsylvania Crime Commission had to say, there was "serious doubt" that Scalleat was "anything" in the Costa Nostra. (Tr. 2267).

Plaintiffs thus had detailed information available to them regarding the bases for the newspaper articles, and they produced considerable evidence in their attempt to prove falsity.

SUMMARY OF ARGUMENT

This Court has properly held in *New York Times Co. v. Sullivan* and its progeny that the First Amendment forbids the recovery of damages by a public official/figure libel plaintiff unless he proves both the falsity of the defamatory statement and that such falsity resulted from defendant's fault, *i.e.*, knowing or reckless disregard for truth. The question presented by this appeal is whether a private libel plaintiff, who is permitted to recover on a lesser showing of fault, is excused from the burden of proving the falsity of the defamatory language. Unless this Court is to disregard the rationale of its decisions in and since *New York Times* and in First Amendment and due process cases generally over many years, the conclusion is inescapable that the plaintiff must be required to prove the key element of a defamation case—the falsity of the complained-of language.

If a publication cannot be demonstrated to be false, no principle of constitutional law or public policy permits recovery by a plaintiff whose conduct in matters of public concern has been accurately reported to the public, no matter how careless, negligent, grossly negligent, reckless or malicious was the conduct of the publisher in the abstract. In other words, because fault unrelated to any falsity is immaterial, the requirement of *Gertz v. Robert Welch, Inc.* that every libel plaintiff prove fault necessarily encompasses proof of falsity as well. It is only falsity attended by fault—or stated conversely, fault in failing to discover the falsity—which is actionable consistent with constitutional principles protecting speech and press.

Furthermore, in First Amendment cases outside of the defamation area, this Court consistently and properly has rejected any statutory scheme which places on the defendant the burden to prove that his speech is protected by the Constitution. Similarly, considerations of due process and fundamental fairness require that the libel plaintiff bear the burden of establishing that the publication is false and hence unprotected.

The trial record of this case demonstrates indisputably that the only impediment to plaintiffs in their effort to prove the falsity of the articles was the force of the facts themselves. As in other areas of the law where the essential elements of the cause of action must be proven by the plaintiff, there was no reason, in terms of either fairness or public policy, to rely upon the irrational presumption that all defamatory statements are false. To the contrary, placing the burden of proving truth on the defendant violates federal constitutional principles by permitting sanctions on speech not found to be false and by deterring reports on matters of public concern.

ARGUMENT

A PRIVATE FIGURE PLAINTIFF MAY NOT RECOVER FOR DEFAMATION WITHOUT ESTABLISHING THE FALSITY OF THE CHALLENGED PUBLICATION.

A. The rationale of this Court's prior defamation decisions mandates that plaintiffs bear the burden of proving falsity.

Pennsylvania, through a statute which fails to recognize First Amendment limitations upon libel actions, places on the defendant the burden of proving the truth of allegedly libelous publications. The statute's failure to require the plaintiff to prove the falsity of the speech is, as the Pennsylvania Supreme Court held, a codification of prior common law decisions. This common law treatment of the truth issue, however, relieves the plaintiff of responsibility for proving the *sine qua non* of any defamation suit—falsity. Such an incongruous distribution of burdens of proof regarding the essential element of a libel action was valid under the common law, where defendants' free speech rights were unrecognized. Since 1964, however, this Court has prohibited States from imposing liability in a defamation action involving a matter of public concern without proof of publication of a false statement with

a requisite degree of fault. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Because only false statements of fact published with fault are undeserving of constitutional protection, a state cannot permit the imposition of sanctions on speech without a determination that the publication is, in fact, false. Permitting the defendant to prove truth does not assure that truthful speech will not be punished. Jurors allowed to find liability without first finding that the speech is false are encouraged, particularly in a close case, to resolve their doubts against constitutionally protected speech and in favor of private reputation. Such a resolution directly conflicts with the rationale of this Court's First Amendment decisions.

1. Pre-*New York Times* common law as codified in Pennsylvania.

The Pennsylvania statute at issue, 42 Pa.C.S.A. §8343(b), gives the defendant in a defamation action the "burden of proving, when the issue is properly raised: (1) the truth of the defamatory communication . . ."

This common law advantage to plaintiffs, however, utterly fails to accommodate defendants' free speech rights. As this Court has recognized, libel law "originated in soil entirely different from that which nurtured [First Amendment] constitutional values." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 151 (1967).

It is difficult to overstate just how barren common law soil was compared to the soil in which First Amendment rights are sown. Libel originated in England primarily as a crime intended to suppress sedition; the crime was later expanded, in both England and the American states, to make punishable any writing which tended to bring into disrepute any individual likely to be provoked to a breach of the peace by the words at issue. *Curtis Publishing Co. v. Butts*, *supra*, 388 U.S. at 151. Originally, common law did not even recognize

truth as a defense. See generally, *Prosser and Keeton on the Law of Torts* 840 (5th ed. 1984). Truth was irrelevant because "neither sedition nor the provocation to a duel was at all lessened because the defamation was true." *Ibid.* Punishment of truthful speech was so incompatible with public policy, however, that truth eventually became a limited defense in criminal libel suits, and, in most instances, a complete defense in civil libel suits. See R. Sack, *Libel, Slander, and Related Problems* 129-131 (1980); L. Eldredge, *The Law of Defamation* §64, at 324-327 (1978). But because the common law presumed that all defamatory words were false, truth was recognized only as a defense, not as an affirmative element in plaintiff's cause of action. (Jt. App. 159). Further, in some states, even the defense of truth was limited, for example, to situations where there were no "malicious motives," or where the publication was for "justifiable ends." L. Eldredge, *supra*, §65, at 328.

In addition to the restricted use of a truth defense, the common law differed from current law in another crucial respect: strict liability was imposed. Publishers were held liable for their defamatory statements, even if published without fault. This harsh result was ameliorated only by the development of a complex system of "privileges" for publications, both absolute (based on the speaker's status) and conditional (based on the occasion on which the statement was made). Keeton, *Defamation and Freedom of the Press*, 54 Tex. L.Rev. 1221, 1222-1223 (1976); R. Sack, *supra*, at 267.

The qualified recognition of truth as a defense and the limited use of privileges were the common law's only acknowledgments of the speech interests of defendants. Libel simply was not viewed as raising any First Amendment considerations. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942). Libelous utterances, under both the common law and this Court's pre-1964 rulings, were viewed as "not being within the area of constitutionally protected speech." *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); *Herbert v. Lando*, 441 U.S. 153, 158 (1979). That view of libel, however, drastically changed in 1964.

2. *New York Times Co. v. Sullivan*

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court constitutionalized the law of defamation and, based on the First and Fourteenth Amendments, imposed limitations upon a State's ability to punish speech concerning public officials. The Court recognized not only that the defense of truth was inadequate to protect the "uninhibited, robust, and wide-open" debate mandated by the First Amendment, *id.* at 270, but that even requiring the plaintiff to prove falsity was insufficient protection when the speech concerns public officials. "[E]rroneous statement is inevitable in free debate [and] must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* at 271-272 (citation omitted). The Constitution thus mandates "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct *unless he proves* that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-280 (emphasis added).

Subsequent cases, which expanded the scope of the *New York Times* rule to encompass, for example, public figures, left no doubt that *New York Times* placed on the plaintiff the burden of proving falsity as well as constitutional malice. Thus, this Court has repeatedly characterized *New York Times* as allowing the public official or public figure to recover "only if *he establishes* that the utterance was false *and* that it was made with [constitutional malice]." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (emphasis added). *Accord: Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966); *Herbert v. Lando*, 441 U.S. 153, 176 (1979); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 490 (1975); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 8 (1970).

Indeed, because *New York Times* explicitly placed the burden of proving constitutional malice on the plaintiff (376 U.S. at 279), it would have been completely incongruous to allow plaintiff to recover without also establishing falsity. If,

for example, a reporter proceeded recklessly in gathering information, but the information published nevertheless turned out to be true, neither the reputational interests of the public official/figure nor the First Amendment interests in assuring "unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484 (1957), could justify holding the publisher liable for damages. Fault alone is insufficient; only false statements made with fault are actionable. *See generally*, L. Eldridge, *supra*, §66, at 330. In short, the question of fault, or constitutional malice, is inextricably intertwined with the issue of falsity. A public plaintiff must prove both elements in order to recover.

Thus, when this Court addressed the type of plaintiff at issue here—the private figure—the common law defamation rules already had been fundamentally altered: the burden of proving falsity, as well as fault (constitutional malice), was squarely on all public official/figure plaintiffs.

3. *Gertz v. Robert Welch, Inc.*

In defamation cases involving individuals who are neither public officials nor public figures, this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), recognized that at least where speech involves matters of public concern, it is entitled to some measure of First Amendment protection.⁷ *See*

7. There can be no question that the speech involved in this action concerns matters of public concern. The articles detail how a state senator used his political influence, even obtaining the intervention of the governor's office, to assist a private enterprise. Moreover, the articles report how the same business which received favorable attention from state government was under active federal investigation for its connections with organized crime. Indeed, when asked what his purpose was in writing the first of the articles in suit, the reporter, who had 20 years of experience in covering state government, testified:

"Well, I thought it was a pretty good textbook example of how things worked in the State government. I think people are taught in school how they ought to work. Very often they don't seem to work that way, and I think one of the functions of a newspaper is to inform people that

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., No. 83-18 (U.S. Sup. Ct. June 26, 1985), slip op. at 1. In view of the lessened First Amendment interests at stake and the greater state concern for the reputations of *private* individuals, the Court struck a different balance than in *New York Times*, requiring proof of some minimal degree of fault to remove the speech from the constitutionally protected zone.

As in *New York Times*, the Court in *Gertz* recognized that the imposition of liability without fault would deter some truthful speech, notwithstanding that the defendant would still have available the defense of truth. 418 U.S. at 340-341. Reiterating the rationale of *New York Times*, the Court noted that the Constitution requires "that we protect some falsehood in order to protect speech that matters." *Id.* at 341. Thus, falsity alone is not enough to support a private figure libel verdict, just as falsity alone is not sufficient in a public official/figure action.⁸ In order to protect "speech that matters" (*id.* at 341), a private person must establish some measure of fault with regard to the publication: "[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 418 U.S. at 347 (footnote omitted).

As plaintiffs have conceded throughout this litigation, *Gertz* unquestionably puts the responsibility for proving fault on the plaintiff. The inescapable conclusion is that *Gertz* implicitly placed responsibility for proving falsity on the plaintiff as well. Negligence by itself, after all, is without legal or practical consequence. Only falsehoods published with fault result

the government is falling short of expectations, and if they're so informed, perhaps they will act in a way through the ballot box which will hopefully bring it closer to the ideal." (Tr. 1583).

8. "It seems clear that the principal concern of the *Gertz* decision is the issue of falsity." Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex. L.Rev. 199, 242 (1976). See *Cox Broadcasting Corp. v. Cohn*, *supra*, 420 U.S. at 498-500 (Powell, J., concurring); *Time, Inc. v. Firestone*, 424 U.S. 448, 458 (1976).

in actionable injury to a plaintiff. Thus this Court has recognized that the decisions in cases from *New York Times* through *Gertz* have "considerably changed" the common law allocation of burdens of proof:

In years gone by, plaintiffs made out a prima facie case by proving the damaging publication. Truth and privilege were defenses . . . The plaintiff's burden is now considerably expanded. In every or almost every case, *the plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability on the part of the publisher.*

Herbert v. Lando, *supra*, 441 U.S. at 175-176 (emphasis added).

The unmistakable implication of the Court's defamation cases, therefore, is that a plaintiff must prove both falsity and fault. In fact, at least 15 jurisdictions, after *Gertz*, have held or suggested that a private plaintiff must bear the burden of proving falsity.⁹ Indeed, this Court already has recognized

9. *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 448 A.2d 1317, 1322, n. 6 (1982); *Harrison v. Washington Post Company*, 391 A.2d 781, 783 (D.C. 1978); *Smith v. Taylor County Pub. Co.*, 443 So.2d 1042, 1048 (Fla.App. 1983); *Applestein v. Knight Newspapers, Inc.*, 337 So.2d 1005, 1007 (Fla.App. 1976); *Troman v. Wood*, 62 Ill.2d 184, 340 N.E.2d 292, 299 (1975); *Sivulich v. Howard Publications, Inc.*, 126 Ill. App. 3d 129, 466 N.E.2d 1218, 1220 (1984); *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (Md. App. 1976); *Brennan v. Globe Newspaper Co.*, 9 Med.L.Rptr. (BNA) 1147, 1148 (Mass.Super. 1982); *Lewis v. Equitable Life Assurance Society*, 361 N.W.2d 875, 880 (Minn.App. 1985); *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 491 (Minn. 1985); *Anton v. St. Louis Suburban Newspapers, Inc.*, 598 S.W.2d 493, 498 (Mo.App. 1980); *Madison v. Yunker*, 180 Mont. 54, 589 P.2d 126, 133 (1978); *Fairley v. Peekskill Star Corp.*, 83 A.D.2d 294, 445 N.Y.S.2d 156, 159 (1981); *Cochran v. Piedmont Publishing Co.*, 62 N.C.App. 548, 302 S.E.2d 903, 904 (1983), cert. denied, 105 S.Ct. 83 (1984); *Horvath v. Ashtabula Telegraph*, 8 Media L.Rptr. (BNA) 1657 (Ohio App. 1982); *Lent v. Huntoon*, 143 Vt. 539, 470 A.2d 1162, 1168 (1983); *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 725 (Va. 1985), cert. denied, Nos. 84-1722, 1723 (July 1, 1985); *Mark v. Seattle Times*, 96 Wash.2d 473, 483, 635 P.2d 1081 (1981), cert. denied, 457 U.S. 1124 (1982).

(Continued)

the innate relationship between the truth issue and the element of fault: "[D]emonstration that an article was true would seem to preclude finding the publisher at fault." *Time, Inc. v. Firestone*, 424 U.S. 448, 458 (1976), citing *Cox Broadcasting Corp. v. Cohn*, *supra*, 420 U.S. at 498-500 (Powell, J., concurring). This means that if a publisher is found to have been at fault, the article must have been shown to be false.

Whether falsity constitutes a separate "element" of plaintiffs' case is problematic. The Sixth Circuit views falsity and carelessness as the two elements comprising fault. *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371, 375 (6th Cir.), cert. granted, 454 U.S. 962, cert. dismissed pursuant to Rule 53, 454 U.S. 1130 (1981). The Pennsylvania Supreme Court, on the other hand, originally stated that falsity is not an element of a libel action at all. *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899, 908 (1971). In its opinion in this case, however, the Pennsylvania Supreme Court characterized its statement in *Corabi* as "troubling," and purported to clarify its position by stating that, although falsity is neces-

Only five state cases, in addition to the decision below, appear to retain the common law distribution of burdens. *Gobin v. Globe*, 229 Kan. 1, 620 P.2d 1163 (1980); *Rogozinski v. Airstream by Angell*, 152 N.J.Super. 133, 377 A.2d 807 (1977), modified, 164 N.J.Super. 465, 397 A.2d 334 (1979); *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976); *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 612, 623-625 (Tex.App. 1984), cert. denied, No. 84-1639 (June 11, 1985); *Denny v. Mertz*, 106 Wis.2d 636, 318 N.W.2d 141, cert. denied, 456 U.S. 883 (1982). Within three other jurisdictions, decisions on the proof issue after *Gertz* appear to conflict. Compare *Elliott v. Roach*, 409 N.E.2d 661 (Ind.App. 1980) (defendant bears burden of proving truth) with *Local 15 v. International Brotherhood of Electrical Workers*, 273 F.Supp. 313 (N.D.Ind. 1967) (applying Indiana law) (plaintiff must prove falsity); compare *Trahan v. Ritterman*, 368 So.2d 181 (La.App. 1979) (falsity presumed where words are defamatory per se) with *Ward v. Sears, Roebuck & Co.*, 339 So.2d 1255 (La.App. 1976) (plaintiff must prove falsity); compare *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir.), cert. granted, 454 U.S. 962, cert. dismissed pursuant to Rule 53, 454 U.S. 1130 (1981) (plaintiff must prove falsity) with *Memphis Pub. Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978) (defamatory statements are presumed false).

sary for recovery, it is presumed from the defamatory nature of the publication. (Jt. App. 160).

Upon analysis, it appears that falsity is an independent element which may be established without reference to fault; fault, on the other hand, necessarily embraces falsity. A plaintiff simply cannot prove negligence in a vacuum, but must prove a publisher failed to report the truth because it was at fault, or negligent. Negligent conduct which does not result in publication of a false statement of fact cannot amount to "fault" in the constitutional sense. Publication of the truth should never be actionable, even if plaintiff could establish that the defendant arrived at the truth by sloppy or even reckless journalistic methods. See *Time, Inc. v. Firestone*, *supra*, 424 U.S. at 458. Thus it is falsity, and negligence in failing to ascertain the truth, which are of constitutional dimension. It is in this sense that fault and falsity are intertwined.

In short, when a plaintiff tries to prove that a publisher was careless with regard to the truth, the plaintiff will have to prove falsity as well.¹⁰ Falsity is the "logical predicate" to a finding of fault. Franklin and Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L.Rev. 825, 857 (1984). Before plaintiffs can even focus on defendants' fault in failing to discover truth, they will necessarily have to establish the truth that defendants carelessly failed to discover. Because plaintiff must prove "as a minimum, lack of a reasonable basis for believing the statement to be true, as a practical matter he would first have to establish the falsity of the statement." Keeton, *Defamation and Freedom of the Press* *supra*, 54 Tex. L. Rev. at 1236.¹¹ Otherwise, plaintiff would be futilely attempting to prove carelessness in the abstract, try-

10. E.g., *Wilson v. Scripps-Howard Broadcasting Co.*, *supra*, 642 F.2d at 375; *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 448 A.2d 1317, 1322 n.6 (1982). See also *Fairley v. Peekskill Star Corp.*, 83 A.D.2d 294, 445 N.Y.S.2d 156, 158 (1981); *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688, 698 (Md.App. 1976).

11. Indeed, the elements of fault and falsity will necessarily be linked in the minds of the jurors. "The degree of uncertainty in the juror's mind on the issue of truth and the degree of uncertainty on the issue of carelessness

ing to separate fault from falsity, when in fact falsity is a component of fault.¹²

This widespread recognition that *New York Times* and *Gertz* have, as a practical matter, altered the burden of proof in defamation cases is reflected in the Restatement of Torts. The *Restatement (First) of Torts*, which is identical to the language of Pennsylvania's burden of proof statute, placed the burden of proving truth on the defendant. *Id.*, §613 and comment h (1938). The *Restatement (Second) of Torts*, however, notes the change wrought by *Gertz*:

The burden of proof of showing fault is undoubtedly upon the plaintiff. If the plaintiff has the burden of showing that the defendant was negligent in failing to ascertain the falsity . . . of the statement . . . , there remains little, if any, significance in the common law position that truth of the statement is a defense to be raised by the defendant and on which he has the burden of proof.

Id., §580B, comment j (1977). See also *id.*, §581A, comment b;¹³ §613.

In the charge to the jury in this action, the trial judge focused on the nexus between falsity and fault: after first instructing the jury that the plaintiffs were required to prove

must be taken into account at the same time in arriving at a conclusion on the issue of fault." *Wilson v. Scripps-Howard Broadcasting Co.*, *supra*, 642 F.2d at 375. Thus, as several commentators have concluded, the burden of proof of falsity must be placed on the plaintiff, together with the burden of proof on the related issue of carelessness, in order to avoid incongruity and confusion in submitting the case to the jury. Keeton, *supra*, 54 Tex. L.Rev. at 1236; Franklin and Bussel, *supra*, 25 Wm. & Mary L.Rev. at 858.

12. See R. Sack, *supra*, at 135 ("It is difficult to prove that falsity resulted from negligence unless it is first proved that there is indeed falsity.")

13. Section 581A, comment b, of the *Restatement (Second) of Torts*, states that the common law's placement of the burden of proving truth on the defendant has been eroded, but "the Institute does not purport to set forth with precision the extent to which the burden of proof as to truth or falsity is now shifted to the plaintiff" (emphasis added).

falsity, the Honorable Leonard Sugerman charged on the issue of fault as follows (Jt. App. 103, 104):

The plaintiffs, in order to prove by a fair preponderance of the evidence the seventh element of their libel action, must prove to you by a fair preponderance of the evidence that the allegedly false and defamatory article or articles were written and published negligently—that is, written and published by the defendants without the exercise of reasonable care on their part to determine whether the defamatory article or articles was or were true or false.

* * *

You will note again in the context of this case that negligence is defined as the absence of reasonable care which a reasonably prudent or careful person would exercise in order to determine whether a defamatory article was true or false before writing or publishing that article.

You the Jury must decide whether the defendants exercised reasonable care in determining whether a defamatory article or articles were true or false. Remember again, "reasonable care" is defined as that care a reasonably prudent or careful person in the circumstances presented in this case would have exercised to ascertain if a defamatory article or articles was or were false before publishing that article or those articles.

In short, the trial court, in order to define negligence in context, properly instructed that the plaintiff, who bears the burden of proving fault, must necessarily prove falsity.

B. Because those who would punish speech must first prove it is unprotected, a libel plaintiff must prove falsity.

The requirement that a libel plaintiff prove falsity does not flow only from logic and this Court's prior decisions in defamation cases. Viewed more broadly, the requirement is

the natural and compelled outgrowth of the protection afforded all types of speech.

The guiding principle of this Court's "speech" opinions is that the First Amendment attempts to secure "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). From *New York Times* through *Gertz* and the recent opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Court has recognized that "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, *supra*, 379 U.S. at 74-75. Because speech on matters of public concern is "at the heart of the First Amendment's protection," *Dun & Bradstreet*, *supra*, slip op. at 9, this Court has provided full protection for truthful information about public affairs, despite its defamatory character. See *Garrison v. Louisiana*, *supra*. Even some false speech about public affairs is protected to provide the "breathing space" necessary for publishers and broadcasters to fulfill their historic role as disseminators of information. *New York Times*, *supra*, 376 U.S. at 271-272. See *Bose Corp. v. Consumers Union*, ___ U.S. ___, 80 L.Ed.2d 502, 525 (1984); *Herbert v. Lando*, *supra*, 441 U.S. at 171-72; *Gertz*, *supra*, 418 U.S. at 340-341.

Just as a rule imposing strict liability for false speech is constitutionally infirm because of its "chill" on truthful expression (*Gertz*, *supra*, 418 U.S. at 342), a rule requiring that a publisher prove truth to escape liability will necessarily inhibit robust discussion of public events. *New York Times*, *supra*, 376 U.S. at 279; *Gertz*, *supra*, 418 U.S. at 340-41. Truth is an elusive concept, often difficult to prove. *New York Times*, *supra*, 376 U.S. at 279. Rules compelling a speaker to guarantee the truth of a publication have been rejected because they invite "self-censorship." *Id.*; *Gertz*, *supra*, 418 U.S. at 341. As Justice Harlan, concurring and dissenting in *Time, Inc. v. Hill*, 385 U.S. 374, 406 (1967), noted:

... in many areas which are the center of public debate "truth" is not a readily identifiable concept, and putting to

the pre-existing prejudices of a jury the determination of what is "true" may effectively institute a system of censorship.

While quantifying self-censorship is difficult,¹⁴ the possibility of imposing liability for true speech is not hypothetical. After surveying all defamation cases reported in the decade after *Gertz*, one group of scholars has concluded that a plaintiff may well "succeed even in a case where the published statement about the plaintiff is true (or at least cannot be disproved)." Bezanson, Cranberg and Soloski, *Libel and the Press, Setting the Record Straight* 32, 1985 Silha Lecture, University of Minnesota (May 15, 1985). Truth and falsity issues are "rarely addressed and are even more rarely decisive in litigation." *Id.* at 23-24. The focus of defamation actions is the fault issue, and particularly where the plaintiff is not required to prove falsity, "it is more than theoretically possible for a plaintiff to win a libel action on the basis of a true statement" by merely concentrating on defendant's conduct. *Id.* at 33. The fault issue, together with placement of the burden of proving truth on defendants, "leaves invitingly open the possibility of winning even when the publication was true or not provably false." *Id.* at 34.

In "public concern" speech cases such as this one, the state's interest in preserving private reputation must yield to the extent necessary to ensure that truthful expression is not punished or, worse, suppressed. Any rule such as that approved by the Supreme Court of Pennsylvania, which elevates

14. Specific documentation of self-censorship is difficult: "[I]t is virtually impossible to identify the causes of any decrease in investigative journalism or controversial stories." Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L.Rev. 1, 17 (1983). As this Court has repeatedly recognized, however, the problem of self-censorship unquestionably exists. See generally, Massing, *The libel chill: How cold is it out there?*, Columbia Journalism Review 31 (May-June, 1985). The impact on smaller media is particularly acute. See generally, Franklin, *supra*, 18 U.S.F. L.Rev. at 17-18; *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 490-491 (Minn. 1985).

private reputation over speech on public affairs, especially speech not proven to be false, plainly fails to satisfy the principles of historic First Amendment analysis. Indeed, the common law rule enforced by the Pennsylvania Supreme Court permits, and perhaps invites, punishment of speech that is as consistent with truth as it is with falsity. The protections afforded by the "fault" requirement are of little solace to a publisher who must bear the burden of establishing the truth of the publication.

The rule adopted by the trial judge, which requires plaintiff to establish falsehood and failure to take reasonable precautions to ascertain the truth, properly balances First Amendment concerns. Such a rule is consistent with the rules adopted in other actions seeking to impose liability for speech.

In "speech" cases other than civil defamation actions, this Court has recognized that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). For that reason, statutory schemes which place the burden on the defendant to prove that the speech is protected by the First Amendment have been rejected consistently by this Court. This principle can be traced as far back as the Sedition Act of 1798, Act of July 14, 1798, 1 Stat. 596, which was constitutionally infirm, in part, because it allowed the government to punish speaking as a crime, unless the speaker could prove truth as an affirmative defense. See Madison's Report, 4 *Elliot's Debates on the Federal Constitution* 570 (1876); *New York Times*, *supra*, 376 U.S. at 274-276. The rule was, perhaps, most clearly articulated in *Speiser v. Randall*, *supra*, at 528-529: "[W]hen the constitutional right to speak is sought to be deterred . . . due process demands that the speech be unencumbered until the [party seeking to inhibit it] comes forward with sufficient proof to justify its inhibition."

The above rule, which requires placement of the burden of proof on the party claiming that speech is unprotected, has

been applied in a variety of contexts. In *Near v. Minnesota*, 283 U.S. 697, 713 (1931), this Court struck down as "the essence of censorship" a criminal libel statute permitting publications to be suppressed unless the publisher could prove that what was written was "true and [was] published with good motives and justifiable ends." Similarly, the Court has invalidated federal statutes that restricted the distribution of allegedly obscene materials through the mail because the distributor was required to "assume the burden of instituting judicial proceedings and of persuading the courts the . . . [materials are] protected expression." *Blount v. Rizzi*, 400 U.S. 410, 418 (1971). A state motion picture censorship scheme also violated free speech rights because the exhibitor was made to assume the burden of persuading the courts that the film was protected expression. "[T]he burden of proving that the film is unprotected expression must rest on the censor." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). Where "the transcendent value of speech" is involved, due process requires the State to bear the burden of persuasion that the speech is outside the First Amendment's protection. *Ibid.* (citation omitted).

In *Speiser* itself, the Court struck down a state property tax provision that required the taxpayer to declare he does not engage in advocacy to overthrow the government. Because the statute employed a procedure which placed on the taxpayer the burden of proof and persuasion of nonengagement in the proscribed speech, it deterred free speech and violated the due process requirement that "speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." 357 U.S. at 529.

There is no reason to treat defamation law differently from other laws that would punish or suppress speech. Particularly where, as here, the risk of liability carries with it the potential for large damage awards, self-censorship and dissipation of speech on matters of public concern, the burden should be on the plaintiff to establish in the first instance that the speech is outside the protected zone. Such a rule, as is demonstrated below, leaves adequate protection for private reputation.

C. Balancing the interests of the parties, fairness considerations dictate that plaintiffs bear the burden of establishing the falsity of a challenged publication.

As the Court recently reiterated, *Gertz* mandates a balancing test, under which the State's interest in compensating a defamation plaintiff is balanced against the publisher's free speech rights. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, *supra*, slip op. at 7. Once the publisher's First Amendment rights are injected into the equation, the common law treatment of the burden of proving truth or falsity cannot stand. The balance tips in favor of the defendant, whose free speech interests are strong and protected by the Constitution, rather than in favor of the plaintiff, whose interest in his own reputation is strong, but does not reach constitutional proportions. See *Paul v. Davis*, 424 U.S. 693, 712 (1976).

As one commentator has stated, there is "a thread of fundamental unfairness" in allowing a plaintiff to file suit, sit back and make defendant prove his case, while the court presumes that "defendant has acted wrongfully" by speaking false words. This common law presumption in plaintiff's favor "runs counter to our usual assumption that a defendant has acted properly unless and until it is proven otherwise." R. Sack, *supra*, at 136. On the other hand, it is completely fair and equitable to put the burden of proving the essential element of falsity on the plaintiff, who seeks to punish allegedly false speech. Such a rule is not unique to libel cases; for example, this Court's treatment of the burdens of persuasion and production in employment discrimination cases provides a helpful analogy for the proper treatment of the burdens in this case.

1. A plaintiff should be required to prove falsity because it is an essential element of a defamation action.

Placing the burden of proving falsity on the plaintiff does no more than require him to prove the key element of his case.

"The sine qua non of recovery for defamation . . . is the existence of falsehood." *Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974). Indeed, those members of this Court who have expressed dissatisfaction with the protection of false speech afforded by the *Gertz* requirement of proof of fault recognize that a plaintiff should be able to vindicate his reputation only upon proving falsity. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, *supra*, slip op. (White, J., concurring in the judgment), pp. 3, 9 n.3.¹⁵

There simply is no reason to relieve a libel plaintiff of proving falsity, the essential ingredient of a defamation action, just as plaintiffs are not relieved of proof of the key elements in other types of actions.¹⁶

This Court's exploration of the ramifications of the placement of the burdens of persuasion and production is particularly illuminating in decisions under Title VII of the Civil Rights Act, 42 U.S.C. §2000e, *et seq.*, where plaintiffs made arguments, similar to those made here, regarding the fairness of leaving the burden of persuasion on plaintiffs. These cases provide an apt and useful analogy because Title VII "reflect[s] an important national policy," *USPS Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983), much as defamation law reflects important concerns for robust discussion of public affairs and for the reputations of individuals. Also, similar to defamation law, the discrimination area presents "societal as well as personal interests on both sides of [the] equation." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

Despite the strong societal concerns and the personal interests of the Title VII plaintiff, this Court consistently has

15. Plaintiff Hepps, when asked why he instituted this action, answered: "To finally get the truth of what happened in Harrisburg, to fight to get my name back, to show that the thrust of these articles was totally false. . . ." (Tr. 2095).

16. Even in Pennsylvania, there is no presumption of falsity in product disparagement cases. See, e.g., *Menefee v. Columbia Broadcasting System, Inc.*, 458 Pa. 46, 329 A.2d 216, 220 (1974); *Young v. Geiske*, 209 Pa. 515, 58 A. 887 (1904).

concluded that "[t]he ultimate burden of persuading the trier of fact [on the essential issue of discrimination] remains at all times with the plaintiff." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Accord: *USPS Board of Governors v. Aikens*, *supra*, 460 U.S. at 716. See also *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978) (defendant need only "articulate" not "prove" non-discriminatory motivation).

The burden of persuasion never leaves the discrimination plaintiff, even though the plaintiff must prove the absence of nondiscriminatory motivation by the defendant, who has greater access to the relevant evidence. See *Board of Trustees of Keene State College v. Sweeney*, *supra*, 439 U.S. at 25. This Court rejected the argument that this burden unduly benefits the defendant and hinders the plaintiff. After plaintiff makes out a prima facie case, only the burden of production shifts; that is, the defendant must provide "clear and reasonably specific" evidence both to rebut the adverse inference raised and to provide plaintiff with a full and fair opportunity to challenge defendant's proof. *Texas Community Affairs v. Burdine*, *supra*, 450 U.S. at 258. Although not bearing the burden of persuasion, "the defendant nevertheless retains an incentive to persuade the trier of fact" on the ultimate issue of discrimination. The defendant's specific evidence would, in turn, provide the plaintiff with the opportunity to challenge defendant's factual assertions. *Ibid*.

This detailed scheme for distributing the burdens of persuasion and production of evidence is equally equitable and appropriate in defamation cases. Defamation plaintiffs must produce evidence creating a prima facie case on the issue of falsity, even if only by denying the truth of the publication. Should defendants fail to challenge that proof, and the jury believes plaintiff's evidence, plaintiff prevails. Cf. *Texas Department of Community Affairs v. Burdine*, *supra*, 450 U.S. at 254. See generally, 9 Wigmore, *Evidence* §2487, at 295 (Chadbourn rev. 1981). When defendant introduces rebuttal evidence tending to demonstrate truth, however, the factfinder must proceed to decide whether the plaintiff has carried his

burden of persuasion. Cf. *USPS Board of Governors v. Aikens*, *supra*, 460 U.S. at 715.

As in discrimination cases, the burden of persuasion should remain with the libel plaintiff, who seeks to punish speech through an award of monetary damages. Because defamation plaintiffs, no less than discrimination plaintiffs, have a full and fair opportunity to carry their burden of persuasion, there simply is no reason to relieve the libel plaintiff of the burden of proving the key element of falsity.

The jury charge given in this case instructed that, in order to prevail, plaintiffs were required to prove falsity by a preponderance of the evidence, just as they were required to prove all the other elements of their case. If the jury was in doubt because the evidence on the falsity issue was equally balanced, then the defendants would prevail. (Jt. App. 97).

Such a result is just and appropriate. In a close case, where it was not shown to the jury's satisfaction that the publication was false, there should be no recovery for defamation. Fairness considerations, as well as First Amendment principles, do not permit recovery for speech where the evidence is equally consistent with truth as with falsity. Were it otherwise, a plaintiff would be permitted to recover monetary damages for speech which has never been found false, a result contrary to this Court's teaching that truth may not be the subject of sanctions where discussion of public affairs is involved. *Garrison v. Louisiana*, *supra*, 379 U.S. at 74.

2. The reasons for presuming defamatory speech is false do not withstand analysis.

The Supreme Court of Pennsylvania offered three arguments in support of the common law rule giving the defendant the burden of proof of truth:

- (a) Plaintiff enjoys a presumption of good character;
- (b) Plaintiff should not be required to prove a negative;
- and

(c) The publisher has "peculiar knowledge" of the facts. (Jt. App. 158, 159). The same arguments have been advanced by commentators and some of those courts which have con-

cluded that *Gertz* does not change the common law requirement that defendant prove truth. But the arguments, considered alone or in combination, fail to justify, and indeed cannot justify, a rule which can lead to the imposition of monetary damages for speech which may be true.

a. Presuming good reputation

First, the "underlying premise" of the rule giving defendants the burden of proof is the presumption that any person accused of wrong-doing is innocent until proven guilty. (Jt. App. 158). Like other courts, the Pennsylvania Supreme Court has merely declared that this presumption of innocence "transcended the criminal law." *Ibid.* See *Corabi v. Curtis Publishing Co.*, *supra*, 273 A.2d at 907, citing *Montgomery v. Denison*, 363 Pa. 255, 69 A.2d 520 (1949).

As two commentators have noted, however, advocates of a presumption of "innocence" or good character "fail to explain" why a concept meant to benefit and shield a criminal defendant should be available as a sword to a civil plaintiff. Franklin and Bussel, *supra*, 25 Wm. & Mary L.Rev. at 860. In a criminal case, the presumption of innocence is consistent with the notion that any jury error should favor the accused; in a libel action, a presumption of falsity suggests to the jury that in close cases it should err in favor of the plaintiff, a notion inconsistent with the "breathing space" needed for speech on matters of public concern. Applied in libel cases, the presumption of plaintiff's good character and the concomitant presumption of the falsity of the publication, when used as a sword to punish speech which may be true, lacks rationality.

This Court consistently has held, in both civil and criminal contexts, that, in order for a legislature to presume one fact from evidence of another, there must be a "rational connection" between the fact proved and the ultimate fact presumed. Presumption of a fact without a "rational connection" to the proven fact violates the Constitution by denying due process or equal protection. *Ulster County Court v. Allen*, 442 U.S. 140, 165 (1979); *Usery v. Turner Elkhorn Mining Co.*,

428 U.S. 1, 28 (1976); *Tot v. United States*, 319 U.S. 463, 467-468 (1948); *Leary v. United States*, 395 U.S. 6, 33-35 (1969); *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86 (1916); *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910). The latter fact must "more likely than not" flow from the proven fact. *Ulster County Court v. Allen*, *supra*, 442 U.S. at 165, quoting *Tot v. United States*, *supra*, 319 U.S. at 467; *Leary v. United States*, *supra*, 395 U.S. at 36.

A presumption of falsity based upon the defamatory nature of a publication fails to meet these constitutional standards. There is simply no rational connection between the defamatory nature of a statement and the presumption that the statement is false. *Wilson v. Scripps-Howard*, *supra*, 642 F.2d at 376. Indeed, because the presumption of falsity is itself built upon yet another presumption—that of good character of the plaintiff—it is "so unreasonable as to be a purely arbitrary mandate," *Mobile, J. & K. C. R. Co. v. Turnipseed*, *supra*, 219 U.S. at 43. The presumption of plaintiff's good character and civil "innocence," which in turn leads to a presumption of falsity, simply fails the rationality test required of any presumption.

b. Proving a negative

A second reason relied upon for putting the burden of proof on the defendants is equally unavailing. The Pennsylvania Supreme Court has reasoned that it is more fair to require a publisher to prove his assertion than to require a plaintiff to establish the absence of factual support for the assertion. In other words, it is too burdensome to require a libel plaintiff to prove a negative. (Jt. App. 159). See also, *Corabi v. Curtis Publishing Co.*, *supra*, 273 A.2d at 908.

Placing the burden on the party who has made an affirmative allegation, however, "is not an invariable test, nor even always a significant circumstance; the burden is often on one who has a negative assertion to prove," 9 J. Wigmore, *supra*, §2486, at p. 288 & n. 2. As the cases cited by Wigmore and other commentators demonstrate, "not all negatives are difficult to prove." Franklin & Bussel, *supra*, 25 Wm. & Mary

L.Rev. at 860. Moreover, "courts long have required plaintiffs to prove negatives in many other areas of the law not involving the first amendment." *Id.* at 861 & n. 140. Thus, courts routinely have required parties to prove a negative in tort cases,¹⁷ as well as in criminal law,¹⁸ tax law,¹⁹ discrimination cases,²⁰ and other substantive areas.²¹

The Restatement also recognizes the ability to prove a negative assertion, including falsity. In an action for slander of title or injurious falsehood, plaintiff must prove that defendant's representations were untrue. *Restatement (Second) of Torts* §651. The comments note that "plaintiff unequivocally has the burden of proving the falsity of the injurious statement." *Ibid.*, comment b. Similarly, *Restatement (Second) of Contracts* §235 (1981) requires a plaintiff to prove the negative assertion that the defendant has not performed his obligations under a contract.

In fact, even the common law recognized a libel plaintiff's ability to prove the very negative assertion at issue here, i.e., that a challenged defamatory statement was not true. "[I]n most jurisdictions, when a common law conditional (qualified) privilege has been established, the burden of proof

17. *E.g.*, *Prentice v. Crane*, 234 Ill. 302, 84 N.E. 916, 918 (1908) (general rule imposing burden of proof on the party asking the court to believe a proposition applies even where he must prove a negative assertion, i.e., that a defendant made false representations).

18. *E.g.*, *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975) (prosecution must prove absence of heat of passion beyond reasonable doubt, despite difficulties of negating such an argument).

19. *E.g.*, *Rand v. Helvering*, 77 F.2d 450, 451 (8th Cir. 1935) (taxpayer claiming loss in sale of stock must establish that no repurchase agreement existed regarding that stock).

20. *E.g.*, *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978) (plaintiff in discrimination case must prove absence of non-discriminatory motivation by defendants).

21. *E.g.*, *Beckman v. Lincoln & N.W. R.*, 79 Neb. 89, 112 N.W. 348, 351 (1907) (plaintiff must prove all allegations necessary to his case, even a negative allegation that the condemnor did not intend to use condemned land for his own purposes).

on the issue of truth shifts to the plaintiff." R. Sack, *supra*, at 134, citing cases at n. 21.²² If even common law acknowledged plaintiff's ability to prove falsity, there is no basis for generally protecting a plaintiff from proving such a negative assertion once a publisher's First Amendment rights are recognized.

c. *Who best knows the facts?*

Finally, the third reason cited for removing the burden of proof from the plaintiff is seriously deficient. The court below relied upon the general principle that the burden of proof should be placed upon the party with "peculiar means of knowledge of the particular fact in issue." (Jt. App. 158). See *Corabi v. Curtis Publishing Co.*, *supra*, 273 A.2d at 908. While libel defendants undoubtedly know upon what facts they have based their assertions, plaintiffs obviously have best access to information regarding the truth or falsity of any assertions about themselves. "A plaintiff is in the best position to know the facts about his own life and activities that will establish falsity." Keeton, *supra*, 54 Tex. L.Rev. at 1236. Indeed, in many cases the plaintiff only testifies that the allegations against him are false.

A defendant may not, of course, sit back and require plaintiff to challenge its assertions in a vacuum. The facts upon which defendant relied in making the accusations against a plaintiff are, under modern discovery rules, divulged prior to trial.²³ Once the factual basis for the publication has been discovered, the plaintiff, with his "unique

22. *E.g.*, *Peterson v. Mountain States Telephone & Telegraph Co.*, 349 F.2d 934, 936 (9th Cir. 1965) (applying Arizona law); *Stukuls v. State*, 42 N.Y.2d 272, 397 N.Y.S.2d 740, 366 N.E.2d 829, 834 (1977); *Bufalino v. Maxon Brothers, Inc.*, 368 Mich. 140, 117 N.W.2d 150, 158 (1962).

23. See, *e.g.*, *Herbert v. Lando*, *supra*, 441 U.S. at 176-177. Prior to the adoption of modern discovery rules, plaintiff had little ability to obtain information from the defendant prior to trial, which may explain in part why the common law presumption of falsity remained in effect. But the availability of liberalized discovery makes it possible for a libel plaintiff to meet his burden of proving "a false publication attended by some degree of culpability on the part of the publisher." *Id.* at 176.

knowledge" about his own behavior, has the best access to information that would refute, or support, the accusations made. See R. Sack, *supra*, at 136.

Plaintiffs argued to the court below that placing the burden of proving falsehood upon them was unfair, given the reliance by *The Inquirer's* reporters upon the Pennsylvania Shield Law, 42 Pa.C.S.A. §5942. Pursuant to this statutory privilege, which permits reporters to refuse to divulge their sources of information, the reporters refused to identify the "federal sources" who initially told them about Thrifty's connections to organized crime. Reliance upon the Shield Law, however, *had no effect whatsoever* on plaintiffs' ability to meet their burden of proving falsity. The reporters testified fully and candidly as to the information they relied upon in publishing the complained-of articles. And it is that *information*, not the names of *The Inquirer's* confidential federal sources, that plaintiffs needed to know in order to attempt to prove the articles false.

As plaintiffs readily conceded, the thrust of the challenged publications was that the Thrifty chain was connected with underworld figures and organized crime. It was that proposition that was required to be proven false. Some of the "underworld figures," such as Joseph Scalleat, were named in the articles, while others were not. Even the "unnamed" connections, however, were disclosed during the lengthy pretrial discovery process. At trial, the reporters not only named the "underworld figures"—Joseph Scalleat, Albert Scalleat, Sr., Morton Hulse, Ralph Puppo, and Michael Grasso—but explained in detail the "connections" between Thrifty and these individuals.²⁴ Indeed, not only were documents such as official Pennsylvania Crime Commission Reports reflecting these "connections" testified to and introduced into evidence,²⁵ but a chart summarizing all of these "connections" was utilized. (Jt. App. 59).

24. See, e.g., Tr. 1616-1624, 1627-1639, 1658-1679, 1691, 3355-3359.

25. See, e.g., Defendants' Exhibits 4, 6-8, 13-20, 23, 24, 26, 27; Tr. 1955-1956.

Thus, while the identities of the federal investigators were not disclosed, plaintiffs were fully able to respond to the "evidence" provided to *The Inquirer* by these investigators, as well as other facts gathered by the reporters, and to attempt to prove them false. That is, of course, precisely what they attempted to do. Finally, the trial court in no way eliminated the possibility that plaintiffs could sustain their burden of proving falsity by challenging the credibility of the reporters for refusing to identify their sources. Indeed, this precise argument was made repeatedly to the jury in plaintiffs' closing argument. See, e.g., Tr. 3706-3707, 3709, 3714.²⁶

In sum, the proper placement of the burden of proof in this "public concern" defamation case cannot turn on the state's treatment of sources of news. The exercise of the Shield Law privilege below in no way added to plaintiffs' burden. On the contrary, the record here documents the detailed nature of the information revealed to plaintiffs and their ability to attempt to prove falsity with specific evidence. Plaintiffs were not hindered in their attempt to meet that burden of proof, other than by the force of the actual facts themselves.

26. Plaintiffs also contended below that they were entitled to an instruction that the jury could draw an "adverse inference" from *The Inquirer's* failure to identify the sources. (Jt. App. 93). The trial court declined to give the requested charge, but permitted plaintiffs' counsel to argue, as he did repeatedly, that the jurors should draw an adverse inference from defendants' refusal to reveal their sources.

CONCLUSION

Two hundred and fifty years ago, a courageous New York publisher and his Philadelphia lawyer established that truthful speech about governmental affairs, no matter how caustic or vehement, could not be suppressed or punished. Now a Philadelphia newspaper comes before this Court seeking reaffirmation of that principle, first established by John Peter Zenger. Vigorous debate on public issues should not be stifled by requiring a publisher to bear the burden of proving to a legal certainty each word which is written. Such a rule would intrude drastically on the field of free debate and cast a net of timidity over those who would comment on matters of public concern.

The First and Fourteenth Amendments mandate that a libel plaintiff prove that the speech he complains of is false. Accordingly, the judgment of the Supreme Court of Pennsylvania should be reversed and the judgment of the Court of Common Pleas on the verdict in favor of defendants should be reinstated.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1984

PHILADELPHIA NEWSPAPERS, INC., *et al.*

Appellants,

v.

MAURICE S. HEPPS, *et al.*

Appellees.

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60 pp

QUESTIONS PRESENTED FOR REVIEW

A.

In a private figure defamation case subject to the rules of *Gertz v. Robert Welch, Inc.*, does the United States Constitution require the Commonwealth of Pennsylvania to impose the burden of proving falsity on the plaintiff?

B.

In view of the fundamental public policy of protecting the sanctity of individual reputation, is it constitutional in a private figure libel case to presume the falsity of defamatory words?

C.

Have the appellants shown a compelling reason to upset the delicate balance struck in *Gertz* between protection of private reputation and freedom of speech, so as to justify the engrafting of a new constitutional restriction on the private figure defamation law of the individual states?

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In the Supreme Court of the United States

OCTOBER TERM, 1984

PHILADELPHIA NEWSPAPERS, INC., *et al.*

Appellants,

v.

MAURICE S. HEPPS, *et al.*

Appellees.

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

This is a private figure libel action by Maurice Hepps ("Hepps"), General Programming, Inc. ("GPI") and a number of other independent corporations against Philadelphia Newspapers, Inc. ("PNI"), the publisher of *The Philadelphia Inquirer* ("*Inquirer*"), and two of its reporters, William Ecenbarger ("Ecenbarger") and William Lambert ("Lambert"). Hepps was the co-founder of GPI, which franchised beer and beverage distributorships known as Thrifty Beverage, and later as Brewers' Outlet, to the other corporate plaintiffs.

1. *Background of Thrifty Beverage*

Hepps, a native of western Pennsylvania, grew up in the beer distribution business, which he learned from his father.

(Tr. 2097.)*Historically in Pennsylvania, which has very restrictive liquor laws, a consumer could buy cases of beer only from licensed distributors who operated small outlets in out-of-the-way, disfavored locations. (Tr. 2099.) While in the Army, Hepps had been stationed in California and Chicago, where he saw self-service beer stores located in shopping centers. Upon his return to civilian life, he decided to develop this innovative concept in his home state. (Tr. 2098.) After his first store was successful, he started a company to franchise beer stores in shopping centers, to lease stores, and to teach people the beer business. (Tr. 2100.) With a few partners, he created Keystone Leasing Company at the end of 1958 and put his plan into operation. (Tr. 2101.) By 1961, Hepps' partners had dropped out of the business, and he was the sole owner. (Tr. 2103.) Keystone Leasing was not particularly successful (Tr. 2103), but through its operations he met William Paulosky ("Paulosky") who owned the Columbia Brewing Company in Shenandoah, Pennsylvania, and they became good friends. (Tr. 2106.) In 1967, Hepps decided to experiment. He and Paulosky formed Realty Research and Development Corp. They began to buy land, build supermarket-type buildings, and stock snacks and soft drinks in addition to beer. (Tr. 2105-2107.) After the first few stores prospered, they began to get inquiries from other distributors, who asked for help in converting their old-style stores to this new concept. In 1969, Hepps and Paulosky formed General Programming, Inc., to establish a chain of franchised beer distributorships with a common name. (Tr. 2108.) This had never been done in Pennsylvania before, but the idea was successful, and the chain grew rapidly. (Tr. 2111.) Hepps submitted the form management agreement and the proposal to operate all the stores under the name "Thrifty Beverage" to the Pennsylvania Liquor Control Board ("PLCB"), and received its approval. (Tr. 2112-13.)

As the chain achieved success, opposition quickly arose from the entrenched distributors, who for years had secret

*Portions of the trial transcript are consecutively numbered, while others are not. Those portions that are will be cited "Tr. (page)." The portions not consecutively numbered will be cited "Tr. (date) at (page)."

agreements among themselves fixing the minimum prices for each brand of beer in each county. (Tr. 2114.) Because of their new method of operation, the Thrifty stores were able to sell well below the fixed prices, and the franchisees refused to accede to the demands of the distributors' organizations that they abide by the price-fixing agreements. (Tr. 2114-15.) As a result, the wholesale distributors boycotted the Thrifty stores, which then could get no beer locally. (Tr. 2115.) During that time, the stores stayed in business only by purchasing beer from Paulosky's distributorship. (Tr. 2116.) Hepps appealed to the United States Department of Justice, Antitrust Division, in Philadelphia, which was able to break the boycott in the counties in the Philadelphia area after a few months. In other counties, such as York in central Pennsylvania, the boycott lasted four years. (Tr. 2117-19.)

The distributors' organizations did not stop there. They caused to be introduced in the Pennsylvania General Assembly and lobbied heavily for several bills that would have given express legislative sanction to their secret price-fixing agreements, and which would have cost Pennsylvania beer consumers approximately \$100 million per year. (Tr. 2141-42.) Hepps went to Harrisburg and testified, along with many consumer groups, before several committees in opposition to those bills. In Harrisburg, Hepps talked to numerous state senators and representatives, one of whom directed him to Senator Frank Mazzei. (Tr. 2155.) He and Paulosky met with Senator Mazzei and reviewed many facts and figures with him. Ultimately, Senator Mazzei supported the effort to defeat these bills, in part because the Duquesne Brewing Company, which was located in his district, also opposed them. (Tr. 2155-57.) The bills were ultimately defeated. (Tr. 2143-46.)

After the distributors' organizations lost the legislative battle, they enlisted the support of Alexander Jaffurs ("Jaffurs"), the chief counsel of the PLCB, in their continued effort to force Thrifty to toe the "price-fixing" line. (Tr. 2187-89.) Jaffurs instituted legal proceedings against three Thrifty stores to declare its franchising arrangements illegal under state law. (Tr. 2227-28.) These proceedings resulted in a ruling by the Court of Common Pleas of Lancaster County that

the franchising agreement violated state liquor laws in several respects, which the court described in its opinion, and ordered the licenses of the three distributorships suspended until the agreements were brought into compliance with the law. (Ex. P-35; Tr. 460, 3232-33.) Throughout these proceedings, Hepps sought to meet with Jaffurs to negotiate a settlement. Jaffurs, however, steadfastly refused to meet with him, although he met regularly with representatives of the distributors. (Tr. 2151-53.) This continued until Senator Mazzei, at Hepps' request, asked Jaffurs to meet with Hepps. (Tr. 2154, 58.) Several meetings were then held, the upshot of which was an agreement on all of the terms of a settlement which would have brought the franchising agreements into compliance with the law, in return for which Jaffurs would agree to recommend to the PLCB that the penalty of license suspensions previously imposed be modified to \$1,000 fines. (Tr. 1990-91, 2159-65, 2185-86, 2431-43.) The only remaining sticking point was that Jaffurs insisted, at the request of the distributors' organizations, that the chain abandon the use of the Thrifty Beverage name. Hepps was unwilling to do this. Finally, Jaffurs indicated he might be willing to drop this point in order to finalize the settlement. (Tr. 2163-65, 67, 80, 90, 2273.)

However, before the settlement could be concluded, and for totally unrelated reasons, Jaffurs was fired by the Governor, and was replaced as counsel for the PLCB by Harry Bowytz, who had been recommended by Senator Mazzei, among others. (Tr. 2232, 3188, 3193.) Hepps had nothing at all to do with Jaffurs' firing (Tr. 2178), and did not know Bowytz. (Tr. 2122.) Hepps then renewed his negotiations with the PLCB through Sidney Simon, the PLCB attorney who had actually tried the Lancaster County lawsuit. Ultimately, Hepps and Simon reached an agreement which was identical to the one tentatively reached with Jaffurs, except that Simon insisted, and Hepps finally conceded, that the Thrifty Beverage name be abandoned. (Tr. 1989-95, 2184, 2225, 2239, 2272-74.) This agreement received the final approval of the PLCB in January, 1975. (Tr. 2236.)

In the interim, Senator Mazzei was indicted and con-

victed for extortion in a totally unrelated matter. (Tr. 2256.) Other facts, which neither Hepps nor Paulosky ever tried to conceal or deny, were that Paulosky was a personal friend of Joseph Scalleat, that Scalleat had in the past worked for Paulosky in a business venture unrelated to the Thrifty chain, that Scalleat was acquainted with Senator Mazzei, and that Joseph Scalleat's nephew, Albert Scalleat, Jr., a former accountant for General Motors, managed one of the Thrifty Beverage distributorships. (Tr. 2200, 2264-65, 2289-90, 2687-89, 2702-03.) In addition, although neither Hepps nor Paulosky knew this, Joseph Scalleat had been described in the 1970 report of the Pennsylvania Crime Commission as an organized crime figure, despite the fact that he had no criminal record and the office of the United States Attorney in Philadelphia had serious doubts about his involvement with organized crime. (Tr. 2267, 2689-90, 3446.)

2. *The Articles in Suit*

Against this background, *The Philadelphia Inquirer*, in a series of five articles published between May 5, 1975 and May 2, 1976, through the difficult-to-refute means of guilt-by-association, painted Thrifty with the broad brush of "ties" to organized crime. (Tr. 2251.) The *Inquirer* thereby accomplished through the press what the distributors' organizations had been unable to achieve in any other way—the effective destruction of the Thrifty chain. (Tr. 2292-2303.)

The *Inquirer* developed the theme that the Thrifty chain was infiltrated by the Mafia as follows:

(a) Senator Mazzei, who was a convicted felon, had, while in the Senate, used improper and illegal political influence to allow the Thrifty chain, in which he owned an interest, to continue to do business despite the fact that it was operating in violation of state law;

(b) Senator Mazzei's motivation for protecting the Thrifty chain was not limited to his financial interest, but also extended to the fact that the chain had a variety of ties to the Mafia through Joseph Scalleat and others (and may even have been a Mafia-front organization), and Sen-

ator Mazzei himself was close to or owed allegiance to the Mafia; and

(c) therefore, the Thrifty chain was closely connected with organized crime. (Tr. 2120-21.)

In developing this theme, the *Inquirer* stated unequivocally that "Federal authorities . . . have found connections between Thrifty and underworld figures" (Joint Appendix at A65), that "[f]ederal agents have evidence of direct financial involvement in Thrifty by [Joseph] Scalleat" (Joint Appendix at A72), and that "the Thrifty Beverage beer chain . . . had connections itself with organized crime." (Joint Appendix at A80.)

At trial, it developed that the *Inquirer's* conclusion that Thrifty was connected to organized crime was based on a number of alleged reasons, including: (a) the "well-known fact" that the Mafia frequently infiltrates businesses through family members, in this case a nephew, Albert Scalleat, Jr. (Tr. 6/12/81 at 157-58, 6/16/81 at 265, 266, Tr. 1676); (b) Paulosky's friendship with and employment of Joseph Scalleat, who in turn was a friend of Senator Mazzei (Tr. 1670-71); (c) one Morton Hulse, an insurance agent for Hepps, GPI and a few Thrifty stores, and a small stockholder in GPI, was later indicted in connection with an insurance fraud having absolutely nothing to do with Thrifty (Tr. 1673-76, 2207-2213, 2695-97, 2730-31); (d) Louis Crocco, supposedly a crime figure, was the husband of a woman who owned a 25% interest in one of the Thrifty stores (Tr. 1677, 2219); and (e) unnamed "federal investigators" had other unspecified evidence of ties between Thrifty and organized crime. (Tr. 1657, 1698-99.)

In researching and writing the articles, the *Inquirer's* reporters never interviewed Hepps or Paulosky despite their offers to meet with the reporters, or gave them an opportunity to respond to the allegations published. (Tr. 2135, 39, 48, 2275, 88-89, 2698.) This was apparently because of their preconceived notion that an organized crime figure would never admit his involvement. (Tr. 6/11/81 at 39, 66, 6/12/81 at 142, Tr. 1639.) On only one occasion did either reporter call Hepps to ask him any questions. That was when Ecenbarger asked Hepps if he had known Harry Bowytz before Bowytz replaced

Jaffurs as PLCB chief counsel. Hepps said no, but also told Ecenbarger about how, *after Bowytz' appointment*, Hepps had learned, in casual conversation, that it was possible that Bowytz' wife's father had removed his tonsils when he was a child. (Tr. 2132-33.) Ecenbarger, in the first article, totally distorted this conversation to make it appear as if Hepps and Bowytz were old friends. (Tr. 2134-35, 2233.)

3. The Trial Testimony

Plaintiffs attempted, as best they could, to refute the sting of these articles. They did so with evidence tending to show (a) that they were *not* connected with organized crime, (b) that they were *not* operating in violation of state law, and (c) that Senator Mazzei had *not* used improper political influence to keep them in business, and had no financial interest in Thrifty. (See, e.g., Tr. 2120-22, 2132-35, 2136-2251, 2253-56, 2258-74, 2278-86, 2288-90, 2291-92, 3204-06.) They also directly denied the accusations. (See, e.g., Tr. 2291-92.) For example, Hepps testified that, despite the extensive governmental investigations of his company, neither he, GPI nor any of the stores was ever indicted for anything, and, in fact, an IRS audit for the years 1972-1981 ended with a finding that the government owed GPI \$278.00. (Tr. 2304-06.)

The difficulty in disproving the accusations, made in a major metropolitan newspaper, of ties to the Mafia through guilt-by-association, particularly where the associations were not denied, but only the guilt, was particularly illustrated by the statements in the article that "[f]ederal authorities . . . have found connections between Thrifty and underworld figures" (Joint Appendix at A65) and that "[f]ederal agents have evidence of direct financial involvement in Thrifty by [Joseph] Scalleat." (Joint Appendix at A72.) Plaintiffs had to try to refute these allegations in the face of the fact that the reporters, relying on the Pennsylvania Shield Law, 42 Pa. Cons. Stat. Ann. §5942(a), refused to identify those federal sources. Indeed, Ecenbarger and Lambert refused to answer questions based on the Shield Law at least 20 times during the trial (See, e.g., Tr. 6/11/81 at 28, 6/12/81 at 151-59, Tr. 14, 16, 110, 111,

230-31, 254, 441-42, 524-32, 580, 1547, 1628-31, 1657, 1662-63, 1666-67, 1671, 1676, 1691-92, 1699-1700, 1767-68, 3358), and were upheld in so doing by rulings of the trial court. (Tr. 6/12/81 at 160; Joint Appendix at A26, *et seq.*) Not knowing who the federal investigators were, plaintiffs could not ask them if they actually had such evidence about Thrifty, or if they had told the reporters that they did.

In addition to upholding the reporters' refusal to identify confidential sources, the trial judge denied plaintiffs' request that he give some sort of adverse inference instruction to the jury, on the ground that to do so would undercut the Shield Law. (Joint Appendix at A144.)

There is no doubt that there was much evidence presented at trial concerning the truth or falsity of the "sting" of the articles just as there was considerable testimony relating to the reporters' negligence in investigating the facts. Ultimately, the trial judge instructed the jury that the plaintiff had the burden of proving both that what had been written was false and that the reporters were negligent. With these instructions, the practical effect of which was that the jury was told to presume that the plaintiffs were guilty of the *Inquirer's* public accusations unless they could prove their innocence, the jury returned a verdict for the defendants.

SUMMARY OF ARGUMENT

The ruling requested by appellants that, in private figure defamation cases subject to the holdings of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Constitution requires that the plaintiff have the burden of proving falsity, if adopted by this Court, would be a complete reversal of the rule that has obtained throughout history. Even where falsity has been considered an element of the cause of action, there are no common law precedents which require the plaintiff to prove falsity. Nor is such a rule compelled by or necessarily implied from any prior decision of this Court.

A private individual's right to preserve the sanctity of his reputation is a basic of our constitutional system and is of equal constitutional magnitude to freedom of speech and the press. Therefore, the presumption that defamatory speech is

false, which derives directly from this fundamental policy, does not offend the Constitution. There is neither any evidence nor any compelling reason to believe that this presumption has, in the past, resulted or will, in the future, result in undue self-censorship.

The delicate balance between the equally fundamental rights of individual private reputation and free speech would be upset if a new constitutional rule requiring a plaintiff to prove falsity were imposed. Instead, the States should be left free to develop rules which, considering each State's unique matrix of relevant constitutional provisions, statutes and common law experience, best strike that balance, provided only that they do not impose liability without fault, presume damages, or award punitive damages absent actual malice. Among the rules which should be left to the States is whether the burden of proving falsity should be shifted to the plaintiff or, as it has been for nearly a millenium, whether the burden of proving truth should remain on the defendant. The Court should not impose a uniform rule on the States in private defamation cases where, consistent with *Gertz*, the Constitution does not require it to do so.

ARGUMENT

I. NEITHER THE COMMON LAW NOR ANY PRIOR DECISION OF THIS COURT HAS REQUIRED A PRIVATE FIGURE DEFAMATION PLAINTIFF TO PROVE THAT THE DEFAMATORY PUBLICATION WAS FALSE

Let there be no doubt—the constitutional rule which appellants are requesting this Court to adopt would represent a 180-degree reversal from the common law and statutory rules which were in effect in substantially every jurisdiction in the nation prior to *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). It was neither expressly nor impliedly mandated by *Gertz*. It is a further effort by the organized media to have the Court overturn centuries of precedent in order to erect a new hurdle in the already obstacle-filled path of the private figure libel plaintiff who seeks to vindicate his reputation.¹ To the extent that the briefs of appellants or their *amici* state otherwise, they are wrong. To the extent that their arguments proceed from that erroneous premise, they are without foundation.

An overview of the history of truth as a defense to defamation actions and a review of the *Gertz* opinion establish that placing the burden of proving falsity on a private defamation plaintiff is neither historically justified nor constitutionally mandated.

A. The History of Truth as a Defense Shows That The Plaintiff Was Never Expected To Prove Falsity.

Truth as a defense to civil defamation has long-standing

1. See, e.g., LDRC Jury Project: Preliminary Report on State Pattern Jury Instructions Reveals Serious Deficiencies in Coverage, Libel Defense Resource Center Bull. No. 10, 1, 7 (Spring, 1984). The Libel Defense Resource Center ("LDRC") describes itself as "an information clearinghouse organized by leading media groups to monitor and study developments in libel and privacy litigation. Supporting organizations include leading publishers and broadcasters, media and professional trade associations representing newspaper, magazine and book publishers, broadcasters, journalists, authors, news directors and newspaper editors, and libel insurance carriers." LDRC Bull. No. 11, 37 (Summer-Fall, 1984).

historical antecedents.² By the thirteenth and fourteenth centuries, actions for defamation were relatively common in the English manorial courts, where a defendant was permitted to plead and prove that his statements were true. *Veeder I*, *supra*, at 549 n.4; *Donnelly*, *supra*, at 102-03. Similarly, the ecclesiastical courts, which until the end of the 16th century exercised substantial jurisdiction over what was called "*diffamation*," appear to have adopted the rule of Roman law that truth was a defense in those cases where the defamatory words related to a matter appropriate for public information. *Ray*, *supra*, at 44 n. 6. In the common law courts, a cause of action on the case for words slowly developed, which focused not on the insult itself, but on the damage which it caused to the plaintiff. There, as well, truth was considered a defense. *Donnelly*, *supra*, at 115.

In the case of *De Libellis Famosis*, 5 Co. Rep. 125 (1606), the Star Chamber discussed the "pernicious effect" inflicted upon society by widely-distributed written derogatory statements, and responded by creating the new crime of libel, which addressed the need to substitute a criminal remedy in place of personal revenge in response to personal insult. Since the crime addressed the form of the derogatory statement (a writing) rather than its substance, the truth of the libel was, for the first time, considered to be "not material."³ *Veeder I*, *supra*, at 562-68; *Donnelly*, *supra*, at 118. Although it is not entirely clear, the viability of truth as a defense to civil libel does not appear to have been affected. *Franklin*, *supra*, at 790 n.9.

2. The discussion which follows is based on the extensive historical research set forth in *Veeder*, *The History and Theory of the Law of Defamation*, 3 Colum. L.Rev. 546 (1903) [hereinafter cited as "*Veeder I*"] and 4 Colum. L.Rev. 33 (1904) [hereinafter cited as "*Veeder II*"]; *Ray*, *Truth: A Defense to Libel*, 16 Minn. L.Rev. 43 (1931) [hereinafter cited as "*Ray*"]; *Donnelly*, *History of Defamation*, 1949 Wis. L.Rev. 99 [hereinafter cited as "*Donnelly*"]; and *Franklin*, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 Stan. L.Rev. 789, 790-805 (1964) [hereinafter cited as "*Franklin*"]

3. The Star Chamber did allow truth as a defense against spoken defamation. *Donnelly*, *supra*, at 119.

By 1640, the Star Chamber was abolished. *Veeder I*, *supra* p.11, at 568. Truth, however, remained unavailable in England as a defense in a prosecution for criminal libel until 1843, when Lord Campbell's Act, Statutes 6 and 7 Vict., Ch. 96, §6, provided that, in criminal libel proceedings, "truth could be given in evidence as a *defense*, when it was alleged and proved that it was published for the public benefit."⁴ *Ray*, *supra* p.11, at 49.

The American colonies resisted the English prohibition of the defense of truth. The rule was successfully challenged in 1735 in John Peter Zenger's defense of a charge of criminal libel in the New York Colony, when the jury returned a general verdict of acquittal despite being instructed by the trial judge that it could not consider the truth of the defamatory publication. After the Revolution, the English rule met with increasing disfavor. The Pennsylvania Constitution of 1790, at art. 9, §7, provided that "in prosecution for the publication of papers investigating the official conduct of officers, or men in public capacity, or where the matter published is proper for public information the truth of the matter may be given in evidence." Like provisions were inserted in the constitutions of Kentucky, Tennessee and Ohio. New Jersey enacted a similar statute in 1799, as did New York in 1805 and Massachusetts in 1827. Even the infamous Sedition Act of 1798, ch. 74, 1 Stat. 596 (1845), allowed the defense of truth. *Ray*, at 46-7.

The New York statute, 1805 N.Y. Laws, ch. 90, § II, was the direct result of the landmark oral argument of Alexander Hamilton for the defense in *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. 1804). Hamilton contended that the "ancient precedents" made falsehood "the essence of the crime" of libel. *Id.* at 343. From that, he argued that the defendant should have been "enabled . . . to procure testimony, to prove the truth of the libel." *Id.* Even though Hamilton had established that falsehood was a material ingredient of the crime of libel, he never argued that the state should have been required to prove falsity.

4. Emphasis added in all quotations throughout this brief unless otherwise noted.

There is evidence that the Star Chamber rule made some inroads on the civil side as well. But truth appears to have been well re-established as a defense in civil suits by the 19th century, both in England and in the vast majority of American courts. *Ray*, *supra* p.11, at 50-53; *Franklin*, *supra* p.11, at 800. In some jurisdictions, however, truth was only a defense if coupled with proof that it was published with good motives or for just cause, because "where a man has retrieved his reputation by a long course of good behavior, it is at least morally wrong for one who knows of the past delinquencies to blast a reputation which has been fairly earned." *Veeder II*, *supra* p.11, at 39 n.3; see also, *Ray*, at 61-69; but see, *Franklin*, at 806-08. By 1931, when the *Ray* article was published, truth was either a partial or complete defense in substantially all American jurisdictions. *Ray*, at 47-8.

This brief historical review shows that truth has long been a defense to civil and criminal charges of defamation. What makes this review relevant to the case at bar is that, despite this long-standing recognition that falsehood is a material ingredient of defamation, not one single case, statute, or constitutional provision can be pointed to which held, prior to *Gertz*, that the burden of proving the falsity of the defamatory words was or should be on the plaintiff.

B. Prior United States Supreme Court Decisions Do Not Require The Plaintiff To Prove Falsity.

Since this is a private figure libel case, the reasoning and rationale underlying *New York Times v. Sullivan*, 376 U.S. 254 (1964), founded as it is in "[t]he right of free public discussion of the stewardship of public officials," 376 U.S. at 275, is inapplicable. Therefore, whether or not *New York Times* requires that a public figure plaintiff bear the burden of proving falsity⁵ is not an issue which need be resolved on this appeal. Rather, the analysis must focus upon the *Gertz* opinion. Appellants

5. Compare *Goldwater v. Ginzburg*, 414 F.2d 324, 338 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970) (public figure plaintiff must prove falsity) with *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 455, 273 A.2d 899 (1971) (even in a public figure case, burden of proving truth remains on defendant).

argue (Appellants' Brief at 18) that "[t]he inescapable conclusion is that *Gertz* implicitly placed responsibility for proving falsity on the plaintiff . . ." *Gertz* did nothing of the sort.

To determine the meaning of *Gertz*, one must consider what the Court expressed to be the issue before it, what it described as its holding, and what it said it sought to accomplish with that holding. As Justice Powell stated the question:

The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements.

418 U.S. at 332. After reviewing the history of recent Supreme Court decisions, Justice Powell addressed the issue with this comment:

We begin with the common ground. Under the First Amendment there is no such thing as a false idea But there is no constitutional value in false statements of fact. . . . They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Id. at 340. Notwithstanding this "common ground," Justice Powell then stated that the current status of the law, which was tantamount to strict liability absent proof of truth, would not do:

Allowing the media to avoid liability *only* by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.

Id. The Court thus recognized that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id.* at 341. However, the Court then immediately recalled Justice Stewart's statement in *Rosenblatt v.*

Baer, 383 U.S. 75, 92 (1966) (concurring opinion), of the sanctity of individual reputation:

[T]he legitimate state interest . . . [in] the individual's right to the protection of his own good name reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of the private personality, like the protection of life itself, is left primarily to the individual states under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a *basic of our constitutional system*.

Gertz, 418 U.S. at 341.

The juxtaposition of these two comments shows that the Court saw as its task the striking of a proper balance between the two fundamental rights of protection of reputation and freedom of press. The Court then discussed the balance that had previously been struck in public official-public figure cases. The Court took pains to note:

We think that these decisions [*New York Times v. Sullivan* and *Curtis Publishing Co. v. Butts*] are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity for liability. Rather, we believe that the *New York Times* rule states an *accommodation* between this concern and the limited state interest present in the context of libel actions brought by public persons.

Id. at 343. Justice Powell then analyzed the difference between public and private figures, and concluded from that analysis that since the "state interest in protecting [private individuals] is . . . greater," the *accommodation* between the conflicting interests should be struck differently. *Id.* Harking back to the notion that the Ninth and Tenth Amendments left the protection of private personality primarily to the States, Justice Powell stated:

[W]e conclude that the States should retain *substantial* latitude in their efforts to enforce a legal remedy for de-

famatory falsehood injurious to the reputation of a private individual.

Id. at 345-46.

From all of this, the Court then announced its *holding*:

We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a *more equitable boundary* between the competing concerns involved here. It recognizes *the strength of the legitimate state interest* in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media *from the rigors of strict liability* for defamation.

Id. at 347-48.

In short, the whole thrust of *Gertz*, as stated many times by Justice Powell, was that of *accommodating two fundamental societal interests*. In so carefully crafted an opinion as *Gertz*, if it was the Court's intention, as a matter of constitutional law, to shift the burden of proving truth or falsity—a shift which would have had a major effect on the accommodation which was the whole purpose of the opinion—that intention would have been explicitly stated.⁶ As one commentator noted in remarks directed to the *New York Times* holding, but which are equally applicable to *Gertz*:

The conclusion that the affirmative defense of truth was neither abolished nor its burden shifted to the plain-

6. In the past, when this Court has intended to modify common law rules of libel, it has always been quite explicit. For example, when the Second Circuit Court of Appeals held that two recent Supreme Court cases had implicitly created an absolute "editorial privilege," the Court retorted:

It is incredible to believe that the Court in *Columbia Broadcasting System* or in *Tornillo* silently effected a substantial contraction of the rights preserved to defamation plaintiffs in *Sullivan*, *Butts*, and like cases.

Herbert v. Lando, 441 U.S. 153, 168 (1979).

tiff comports with centuries of recognition by the common law that defamation defendants have two defenses—truth and privilege. If the Court meant to meddle with the former as well as modify the latter, it would certainly have been more specific.

Eaton, *The American Law of Defamation through Gertz v. Robert Weich, Inc. and Beyond: An Analytical Primer*, 61 Va. L.Rev. 1349, 1382 (1975). Similarly, Professor Randall P. Bezanson has said:

Some courts have held that proof of actual falsity is a constitutional requirement in defamation cases. . . . The weight of authority is the other way, however, and this seems to represent a better reading of the Court's decisions. . . .

Bezanson, *Fault, Falsity and Reputation in Public Defamation Law: An Essay on Bose Corporation v. Consumers Union*, 8 Hamline L.Rev. 105, 106 n. 6 (1985).

Those who argue that *Gertz* did shift this burden of proof often rely heavily on footnote 10 of the Court's opinion. 418 U.S. at 347. However, all that footnote does is reject Justice White's view that if a defendant cannot prove truth, he must be liable because he could never be without fault "in any meaningful sense." The footnote relates very closely to the Court's earlier comment that "[a]llowing the media to avoid liability *only* by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties." 418 U.S. at 340. Indeed, footnote 10, by rejecting Justice White's view, illustrates that the majority did *not* consider it necessary to impose upon the plaintiff the burden of proving falsity. It emphasizes that, although the Court felt that a defendant retained the ability to plead and prove truth as a complete defense, that protection alone was inadequate to accommodate the competing interests that were present. To bring the scales into proper balance, the Court added one more element—proof of fault.

The conclusion that *Gertz* did not, either directly or by implication, create a constitutional rule that a private figure

defamation plaintiff must prove falsity is buttressed by reference to one prior, and several subsequent, libel decisions of this Court.

The prior decision is *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), which also arose under Pennsylvania law. While the plurality opinion in *Rosenbloom* was later explicitly rejected for a less stringent standard of liability in *Gertz*, the predecessor of the very Pennsylvania statute which is at issue here was quoted in full by Justice Brennan in that opinion, together with the comment that "Pennsylvania has also enacted verbatim the Restatement's provisions on burden of proof, which place the burden of proof for the affirmative defenses of truth and privilege upon the defendant." *Id.* at 38. Significantly, there is nothing in that opinion to indicate that the plurality considered Pennsylvania's statutory allocation of the burden of proving truth to be unconstitutional.

This reading of the *Rosenbloom* plurality opinion finds further support in Justice Harlan's dissent, the reasoning of which ultimately found expression in the *Gertz* majority opinion. Justice Harlan stated:

I think we all agree on certain core propositions. . . . Third, although libel law provides that truth is a complete defense, that principle, *standing alone*, is insufficient to satisfy the constitutional interest in freedom of speech and press.

Id. at 64. In other words, there was nothing wrong with the traditional rule that truth is a defense, but that rule alone was just not enough to satisfy constitutional requirements. Justice Harlan also noted "I do not think it can be gainsaid that the States have a substantial interest in encouraging speakers to carefully seek the truth before they communicate. . . ." *Id.* at 70.

Less than one year after *Gertz*, this Court decided, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), that the Constitution requires that "the publication of truthful information contained in official court records open to public inspection" be a defense to the common law cause of action for invasion of privacy. *Id.* at 495. In a majority opinion written

by Justice White, the pertinent portions of which were joined in by Justices Brennan, Stewart, Marshall and Blackmun, the Court resisted the media's urging to adopt a "broad holding that the press may not be made criminally or civilly liable for publishing information that is neither false nor misleading but absolutely accurate, however damaging it may be to reputation or individual sensibilities," *id.* at 489, and stated instead that:

[t]he Court has nevertheless carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamation action brought by a private person as distinguished from a public official or public figure.

Id. at 490. If, in a private figure libel case, the Court has not even decided whether the Constitution requires that truth be recognized as a defense, it follows that it certainly has not decided that falsity is a constitutionally required element of the cause of action of libel, the burden of proof of which must be placed upon the plaintiff.⁷

One year later, the Court decided *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). One of the defenses raised by *Time*, and vigorously pressed by it before this Court, was the defense of truth. *Time* argued that "its report of [the Firestone] divorce was factually correct." *Id.* at 457-58. The Court rejected that defense because the jury, under an instruction which made truth a complete defense and which placed the burden of proving truth on the defendant,⁸ had found that the news arti-

7. Justice Powell, in a concurring opinion, stated his view that truth must be considered a complete defense in cases subject to *Gertz*. 420 U.S. at 497. But he did not state, or even imply, that the Constitution therefore requires that a private figure libel plaintiff be saddled with the burden of proving falsity.

8. The jury was instructed as follows:

I instruct you that there can be no recovery in this case if you find from the greater weight of the evidence that the article as published had no different effect than the divorce judgment in the case of *Firestone v. Firestone*, Case No. 64 C 2790C.

Firestone v. Time, Inc., 305 So.2d 172, 177 (Fla. 1974).

cle was not true. Both the Florida Supreme Court and this Court thereafter ruled there was ample support in the record for this factual finding. *Id.* at 458-59. If the Court felt that the Constitution required that the burden of proving falsity has to be on the plaintiff, it could not have sustained this jury finding because it would have been based upon an unconstitutional allocation of the burden of proof.

Against the substantial weight of this authority and the explicit statement in *Cox Broadcasting* described above, appellants make three demonstrably weak arguments purporting to show that the Court has already decided that a private figure libel plaintiff must, by constitutional fiat, prove falsity. First, they argue that the constitutionally-mandated fault requirement of *Gertz* "necessarily embraces falsity." (Appellants' Brief at 21.) That argument was rejected by the Pennsylvania Supreme Court for the obvious reason that fault, or negligence, is an objective standard which focuses on the manner in which the information was gathered, regardless of its truth or falsity.⁹ (Joint Appendix at A172 n.13.) It does not require a subjective inquiry into the reporter's state of mind or awareness of probable falsity, as might the "actual malice" standard. See, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. —, 104 S.Ct. 1949 (1984). Even if one were to accept appellants' argument that falsity is the "logical predicate" to a finding of fault (Appellants' Brief at 21) an evidentiary presumption of falsity is not logically inconsistent with a constitutional requirement that fault must be an element of plaintiff's case in chief. "[T]here is no inconsistency in assuming falsity until defendant publisher proves otherwise and requiring the plaintiff to prove negligence or recklessness with respect to the truth or falsity of the imputation."

9. For example, a reporter, with absolutely no supporting information whatsoever, could write that a local landowner bribed a zoning officer to obtain a variance. Such a story would be defamatory of the landowner because it accused him of a crime. In publishing the story without any supporting information, the reporter certainly would be negligent. But if it turned out that the landowner did in fact pay the bribe, the reporter would have a complete defense—truth. In that case, the reporter would have been negligent, but lucky.

W. Keeton, D. Dobs, R. Keeton and D. Owen, *Prosser and Keeton on the Law of Torts* §116, at 839-40 (5th ed. 1984).

Second, appellants argue that all truthful speech is presumptively protected by the Constitution, and it is impermissible to place the burden on a defendant to prove that his speech is protected. (Appellants' Brief at 26.) In support of the former proposition, they cite *Garrison v. Louisiana*, 379 U.S. 64 (1964), and in support of the latter, they rely upon *Garrison*; *Speiser v. Randall*, 357 U.S. 513 (1958); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Freedman v. Maryland*, 380 U.S. 51 (1965); and *Near v. Minnesota*, 283 U.S. 697 (1931). In making these arguments, appellants have stretched their precedents far beyond the holdings or intended meanings of the particular cases.

Garrison was a criminal libel prosecution in which the persons defamed were public officials. The Court held that, in such a case, the defense of truth could not be negated by a showing of malice in the sense of ill-will. Instead, the Court said that "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." 379 U.S. at 74. To the extent that this language extends beyond "public officials" or "public figures" to "public affairs," it has since been limited by *Gertz* to public officials or public figures, since *Cox Broadcasting* expressly stated that the issue has not been decided in the case of defamation actions brought by private persons. 420 U.S. at 490. Therefore, appellants' reliance upon *Garrison* to support their premise that truthful speech is presumptively protected by the Constitution in private figure libel cases is misplaced.

However, even if *Garrison* did support that premise, the conclusion which appellants would have the Court draw—that it is unconstitutional to place upon a libel defendant the burden of proving truth—does not follow and is unsupported by precedent. As will be shown below, at 25-29, a majority of the present members of this Court have explicitly said that the right of free speech and the right to the sanctity of individual private reputation are equally compelling under the Constitution. Consequently, if truthful speech is presumptively protected by the Constitution, so is good private reputation. Speech which impugns reputation must therefore create a

clash of *equally strong presumptions*. That clash cannot be resolved by simplistically saying that, since true speech is constitutionally protected, the burden must be on the plaintiff to show that the speech is false, and therefore unprotected. Equal logic supports the converse proposition that, since individual private reputation is constitutionally protected, the burden must be on the defendant to show that the reputation is bad, and therefore unprotected. Absolutes provide no answer to this dilemma. Instead, a balance must be achieved which accommodates both fundamental rights. The *Garrison* court had no occasion to strike that balance because the persons defamed were public officials, and *New York Times v. Sullivan* had already concluded that the right of free speech in criticizing public officials far outweighed individual reputational interests. Therefore, appellants' effort to engraft the holding of *Garrison* on the delicate balance achieved in *Gertz* is both unjustified and unwise.

Speiser v. Randall, 357 U.S. 513 (1958), also relied upon by appellants, is easily distinguishable because that decision pivoted on the fact that an individual's right of free speech was more important than a state's interest in establishing a procedure for claiming a tax exemption. *Id.* at 528-29. As noted above, however, in the case of private figure defamation, the competing interests—free speech and sanctity of individual reputation—stand on *equal constitutional footing*. The remaining cases, *Near v. Minnesota*, *Blount v. Rizzi*, and *Freedman v. Maryland*, involve issues of prior restraint. The body of case law relating to prior restraint obviously has totally different implications, and flows from a different theoretical underpinning, than the law of defamation. See, *In Re Grand Jury Matter*, No. 84-1721, slip op. at 9-10 (3d Cir. June 24, 1985).

Third, appellants argue that the weight of authority in the lower courts has interpreted *Gertz* to hold that the Constitution requires that the plaintiff have the burden of proving falsity. Appellants point to fifteen jurisdictions that have so ruled, as opposed to six, including Pennsylvania, that have ruled to the contrary, and three jurisdictions where the cases appear to conflict. (Appellants' Brief at 19 n.9.) Of course, the disposition of a constitutional issue is not determined by totting up the state and lower federal court decisions on each

side. But certainly these decisions are entitled to respect, and should be examined.

In reviewing these cases, it appears that the highest courts of only twelve states and the District of Columbia have addressed the issue. According to appellants, eight have decided that *Gertz* required that the plaintiff must prove falsity, while five have held, even after *Gertz*, that it was constitutional to place the burden of proving truth on the defendant.¹⁰ Of the eight state high courts which appellants say have ruled that *Gertz* requires the plaintiff to prove falsity, Minnesota and Vermont do not, on review of the *Jadwin* and *Lent* opinions, appear to have so held, the District of Columbia in *Harrison* did not directly address the issue, and Connecticut, Illinois,¹¹ Montana and Washington seem to have adopted the

10. The courts which are claimed to have ruled that the plaintiff must prove falsity are: Connecticut: *Goodrich v. Waterbury Republican-Americans, Inc.*, 188 Conn. 107, 448 A.2d 1317, 1322 n.6 (1982); District of Columbia: *Harrison v. Washington Post Company*, 391 A.2d 781, 783 (D.C. 1978); Illinois: *Troman v. Wood*, 62 Ill.2d 184, 340 N.E.2d 292, 299 (1975); Minnesota: *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 491 (Minn. 1985); Montana: *Madison v. Yunker*, 180 Mont. 54, 589 P.2d 126, 133 (1978); Vermont: *Lent v. Huntoon*, 143 Vt. 539, 470 A.2d 1162, 1168 (1983); Virginia: *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 725 (Va. 1985), *cert. denied*, 105 S.Ct. 3513 and 3528 (1985); and Washington: *Mark v. Seattle Times, Inc.*, 96 Wash. 2d 473, 483, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982).

Those ruling that the defendant still must prove truth are: Pennsylvania: *Hepps v. Philadelphia Newspapers, Inc.*, 485 A.2d 374 (Pa. 1984); Kansas: *Govin v. Globe*, 229 Kan. 1, 620 P.2d 1163 (1980); Oklahoma: *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976); Wisconsin: *Denny v. Mertz*, 106 Wis.2d 636, 318 N.W.2d 141, *cert. denied*, 459 U.S. 883 (1982); Tennessee: *Memphis Pub. Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978).

11. Interestingly, in *Heinrich v. Illinois*, 104 Ill.2d 137, 470 N.E.2d 966 (1984), *appeal dismissed*, No. 84-1346 (U.S. April 15, 1985), the Illinois Supreme Court concluded, based on its reading of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), that the Constitution does not require truth to be an absolute defense in a criminal libel action involving a private figure, and therefore upheld a state statute that had been interpreted to place on the defendant the burdens of proving truth, and that the utterance was made with good motives and for justifiable ends. This case raises a serious question as to whether Illinois really does require the plaintiff to prove falsity in a civil libel case.

rule without discussion. Only Virginia, in *Gazette, Inc. v. Harris*, 325 S.E.2d 713 (1985), *cert. denied*, 105 S.Ct. 3513 and 3528 (1985) actually analyzed the issues and concluded that the plaintiff must prove falsity. In short, the authorities are considerably less weighty than appellants' statistics would indicate. And a comparison of the Virginia Supreme Court's opinion in *Gazette* with the Pennsylvania Supreme Court's decision in *Hepps* shows that there are respectable arguments on both sides of the issue of where the burden of proving truth or falsity should be placed. That itself is another reason why, rather than casting this issue in constitutional concrete, it should continue to be left to the States for future experimentation and development.

C. Summary

The preceding analysis of the historical development of truth as a defense and of the decisions of this Court shows that the constitutional rule sought by appellants in this case would be a new rule, without foundation in the common law or prior Supreme Court decisions. The question then becomes whether the Court should upset the balance established in *Gertz* and engraft this new constitutional requirement on the law of libel. It is to this issue that the balance of this brief will be addressed.

II. IN DEFAMATION CASES SUBJECT TO GERTZ, THE COURT SHOULD NOT IMPOSE A NEW CONSTITUTIONAL REQUIREMENT THAT THE PLAINTIFF MUST SUSTAIN THE BURDEN OF PROVING FALSITY IN ORDER TO PREVAIL.

A. Appellants' Constitutional Arguments Lack Substance.

Appellants argue that the constitutional balance struck in *Gertz* should be tilted in their favor principally for three reasons: (1) because their "free speech interests" are stronger than the private individual's interest in his own reputation (Appellants' Brief at 28); (2) because the presumption of falsity lacks rationality (Appellants' Brief at 32); and (3) because a rule requiring a publisher to prove truth to escape liability will lead to self-censorship, which is undesirable (Ap-

pellants' Brief at 24).¹² None of these arguments can withstand analysis.

(1) *Free Speech and Individual Reputation Are Equal Constitutional Rights.*

In private figure libel cases subject to the holding of *Gertz*, protection of private reputation is a right of equal constitutional magnitude to freedom of speech. The haughty refusal of appellants and their *amici* to recognize this equality undercuts substantially all of their arguments.

Justice Stewart, in language quoted with approval by Justice Powell in *Gertz*, *supra*, 418 U.S. at 341, and again in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 53 U.S.L.W. 4866, 4868 (U.S. June 25, 1985) (No. 83-18), characterized the individual's right to the protection of his own good name as "a concept at the root of any decent system of ordered liberty," and "a basic of our constitutional system." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (concurring opinion). Justice Marshall, in his dissenting opinion in *Rosenbloom v. Metro-media, Inc.*, 403 U.S. 29, 78 (1971), in which Justice Stewart joined, described "[t]he protection of the reputation of such anonymous persons" and "a free and unfettered press" as "two essential and fundamental values." He also stated, *id.* at 81, that "[a] generally applicable resolution is available that promises to provide an adequate balance between the interest in protecting individuals from defamation and the *equally basic interest* in protecting freedom of the press."

Justice Brennan, in *Paul v. Davis*, 424 U.S. 693, 723 n.11

12. Appellants also argue that it is more fair to require a plaintiff to prove falsity than to have the defendant prove truth (Appellants' Brief at 28, 31), that it is not unfair to require a plaintiff to prove the negative, that is, that the statements about him were not true (Appellants' Brief at 33-35), and that a plaintiff has the best access to information concerning the truth or falsity of assertions about himself (Appellants' Brief at 35-37). But these are all policy arguments properly addressed to the state courts or legislatures. They do not raise issues of constitutional magnitude. *See, infra*, at pp. 42-45.

(1976) (dissenting opinion) said that "the interest in one's good name and reputation . . . , when recognized under state law, is sufficient to overcome the specific protections of the first Amendment." And that same year, Justice Rehnquist, in the opinion for the Court in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), in which he was joined by Chief Justice Burger and Justice Blackmun, described the *Gertz* decision as "a more appropriate accommodation between the public's interest in an uninhibited press and its *equally compelling need* for judicial redress of libelous utterances." *Id.* at 456. In short, Chief Justice Burger and Justices Brennan, Marshall, Blackmun, Powell and Rehnquist have either written or joined in opinions expressly stating that the right to reputation has equal constitutional standing with the right of a free press in private figure defamation cases subject to *Gertz*. Therefore, it ill-behooves appellants to argue that the interest of a private person in protecting his own reputation "does not reach constitutional proportions." (Appellants' Brief at 28.)¹³

There is inestimable, transcendent value in a good name. According to Anthony Lewis, a well-known columnist, "[f]reedom of expression is not the only value involved in libel cases: not for me, at any rate. There is also reputation, a characteristic close to the sense of self—to the integrity of one's personality." Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amend-*

13. Appellants cite only *Paul v. Davis*, 424 U.S. 693 (1976) to support their contention. *Paul v. Davis* holds merely that defamation of an individual by a government entity, *absent allegations of resulting loss of liberty or property*, does not constitute a deprivation of liberty or property under color of state law so as to require invocation of the procedural due process protections of the Fourteenth Amendment, and therefore does not state a claim under the Civil Rights Act.

The *amicus* brief of Capital Cities Communications, Inc., *et al.*, at 14, adds that "when faced with a claim by a private figure plaintiff involving speech about public affairs, the Court has concluded 'that the state's interest is not substantial relative to the First Amendment interest in public speech.' *Dun & Bradstreet*, 53 U.S.L.W. at 4869 n. 7. . . ." However, at that point in the *Dun & Bradstreet* opinion, the "state interest" to which Justice Powell was referring was the interest in awarding presumed damages, not the broad state interest in protecting reputation.

ment," 83 Colum. L.Rev. 603, 614 (1983). It is a right the protection of which long antedates the Constitution. It is a right that is a "basic of our constitutional system." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). While the right is not explicitly mentioned in the Constitution, and its protection is left primarily to the States, it is no less fundamental than, and is intimately related to, the right of personal privacy. Justice Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), in addressing the right of privacy, said:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.

Palko v. Connecticut, 302 U.S. 319, 325 (1937), indicates that rights safeguarded by the First Amendment are "fundamental" or "implicit in the concept of ordered liberty." Justice Stewart used almost the identical words when he spoke of the right to protection of reputation as "a concept at the root of any decent system of ordered liberty." *Rosenblatt*, 383 U.S. at 92. In *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), Justice Douglas said that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." The right of the private person to protection of reputation falls within the penumbra of the various constitutional guarantees which have been deemed to create the right of privacy, most particularly, as the Pennsylvania Supreme Court pointed out below, the presumption of innocence. (Joint Appendix at A158.)

The implications of appellants' contention that the right to freedom of the press outweighs the individual's right to protect his private reputation are particularly troubling. Their argument starts with the proposition that the press serves the public interest as a disseminator of information and opinion which the people will then use to the greater public good. As the public's agent, so the argument goes, the press has "come to think of itself as possessed of a kind of indefinite but powerful

mandate to ferret out and rectify wrongs in the society..." Bollinger, *The Press and The Public Interest: An Essay on the Relationship Between Social Behavior and The Language of First Amendment Theory*, 82 Mich. L.Rev. 1447, 1454 (1984) [hereinafter cited as "*Bollinger*"]. A perfect example of this is reflected in an address delivered by Seymour Topping, Managing Editor of the *New York Times*, to the Judicial Conference of the United States Court of Appeals for the Tenth Circuit in July, 1983, where he said:

Watergate was only one of the more dramatic examples, of which there are many, in which the press, as the *fourth branch of government*, alerted our society to grave abuse of our democracy when the executive, the legislative and yes, even the judiciary, failed to act with dispatch.

Topping, *First Amendment and The Press*, 100 F.R.D. 85, 86-87 (1983). The press acknowledges its potential for inflicting harm upon individuals, but asserts that the value of the social function it performs reduces the issue of individual harm to relative insignificance.¹⁴

Traditionally, the press does not follow the logic of its argument beyond this point. But that does not mean that others must likewise abandon the analysis. If the press considers itself as the agent of the people for the purpose of improving the social welfare, it must also acknowledge that it serves at least a semi-official institutional status ("the fourth branch") within our system of government. In our society, all organizations officially charged with exposing wrongdoing are subject to certain limitations on their power, so as to preserve individual rights: witness the presumption of innocence and the privilege against self-incrimination. No one suggests that the press ought to be subject to such official limitations. "The point is simply that there are serious risks of injustice and improper behavior *whenever anyone*¹⁵—official or unofficial—envision[s] for themselves a mandate to expose and rectify the

14. See, Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L.Rev. 1, 23 n.105, 25 n.18 (1983). Professor Franklin does not adopt this view, but succinctly explains it.

15. Emphasis in original.

wrongdoing within the society." *Bollinger*, *supra* p. 28, at 1455. Those risks are minimized by recognizing that the private individual's right to protect the sanctity of his reputation is as important to our freedom as is the institutional role of the press as public servant.

(2) *The Presumption of Falsity Is Constitutional.*

The Pennsylvania Supreme Court concisely explained the rationale for the presumption of falsity of defamatory words:

The underlying premise concerning the character of the defamed individual is the principle that any man accused of wrong-doing is presumed innocent until proven guilty. The decisions reasoned this principle transcended the criminal law and was equally applicable to the ordinary affairs of life.... Based upon this premise we developed the rule that in actions for defamation, the general character or reputation of the plaintiff is presumed to be good. ... Since the gravamen of defamation is that the words uttered or written tend to harm the reputation, a consequence of the rule presuming the good reputation of the plaintiff was a presumption of the falsity of the defamatory words.

(Joint Appendix at A158.)¹⁶ Appellants assert that the presumption of falsity is unconstitutional because "[p]resumption of a fact without a 'rational connection' to the proven fact violates the Constitution by denying due process or equal protection." (Appellants' Brief at 32.) See also, *Amicus Brief of ACLU, et al.*, at 13-14. There are at least three reasons why

16. The Court noted that the presumption of falsity was invoked in libel cases because "although falsity is an element of the cause of action, we have concluded that the burden should be placed upon the alleged defamer to establish the truth of these accusations and will presume it in the absence of proof to the contrary." (Joint Appendix at A160 n.2.) Since the issue here is the constitutionality of a *state statute* allocating the burden of proof, not a common law rule, what the court really meant was that the Pennsylvania General Assembly had made this determination. So the precise issue to be considered is whether the legislatively-created presumption of falsity violates the Constitution.

this argument is without merit.

First, the rule upon which appellants rely is a rule most applicable to the field of criminal law, where the state must bear the burden of proving guilt. "Outside the criminal law area, where special concerns attend, the focus of the burden of persuasion is normally not an issue of federal constitutional moment." *Lavine v. Milne*, 424 U.S. 577, 585 (1976). This is especially so where the presumption is not conclusive, but merely rebuttable. *Manley v. Georgia*, 279 U.S. 1, 6 (1929); *Heiner v. Donnan*, 285 U.S. 312, 329 (1932).

Second, and most important, it is entirely permissible and proper for a presumption to rest upon, and be rationally derived from, an important policy as well as an antecedent fact. The seminal case of *Mobile, Jackson & Kansas City Railroad Co. v. Turnipseed*, 219 U.S. 35 (1910), acknowledged this when the Court said:

it must be obvious that the application of the act to injuries resulting from "the running of locomotives and cars" is not an arbitrary classification, but one *resting upon considerations of public policy*, arising out of the character of the business.

Id. at 43. The most basic example of this rule is the presumption of innocence. There is no rational connection between the antecedent fact—indictment for a crime—and the presumed fact—innocence of that crime. Indeed, if we assume that an indictment is preceded by the presentation of evidence to a grand jury, and that the grand jury indicts based upon a showing of sufficient evidence, and if we consider the percentage of indicted persons who plead or are found guilty, the presumption of innocence is totally irrational. But as a nation, we have decided that this policy is of overriding importance.

Another example of a presumption based upon policy is the presumption of legitimacy—that a child born in wedlock is the offspring of the mother's husband. In *McMillian by McMillian v. Heckler*, 759 F.2d 1147 (4th Cir. 1985), this presumption was adopted as an element of federal common law because:

[t]he presumption is one of the most venerable, persistent, and continuously pervasive in the common law. . . . In variant forms, now frequently codified, it is currently applied in most, if not all, states. . . . The reason is plain. Though evidentiary in form, it is substantive in its intended effect as a conservator of generally recognized fundamental social values related to the institutions of marriage and family and to the stability and predictability of property interests

Id. at 1153.

Again, in the field of labor law, a certified union is presumed under certain circumstances to have the support of a majority of the bargaining unit, subject to proof to the contrary. The Ninth Circuit has approved that presumption, while recognizing that "the basis of the presumption is primarily policy, not probability; it is a vehicle for maintaining industrial peace." *N.L.R.B. v. Tahoe Nugget, Inc.* 584 F.2d 293, 303 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979). *Accord*, *N.L.R.B. v. Silver Spur Casino*, 623 F.2d 571, 578 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981).

Third, because of the rhetoric surrounding the law of libel in the past twenty years, there has developed a tendency to consider that many of the issues raised in these cases have constitutional implications when in fact they may not. The issue of the burden of proving truth or falsity is an example. The theories behind truth being an absolute defense are founded alternatively in public policy—that the defendant performed a service in bringing an individual's bad character to the attention of the public, or that the court will not, as a matter of policy, reward a person of bad character—or in the simple fact that the plaintiff has excluded himself from recovery by his bad conduct. *Ray, supra* p.11, at 54-57. Under either theory, it could easily be said that, by having committed the acts publicized, the plaintiff "assumed the risk" of publication. The defense of assumption of the risk, which in negligence law has always been the defendant's to plead and prove, does not raise constitutional issues just because the risk assumed is the risk of injury resulting from publication, rather

than from some other cause.

As these cases and arguments show, it is therefore not only constitutional, but entirely right and proper, to presume the falsity of defamatory words from the fundamental individual right to protection of reputation.¹⁷

(3) *The Fear of Self-Censorship Is Unsupported and Unsupportable.*

Appellants suggest that a rule requiring a publisher to prove truth in order to escape liability will lead to self-censorship.¹⁸ This is the archtypical "straw man" argument. A

17. See, e.g., *Speiser v. Randall*, 357 U.S. 513, 532-33 (1958) (Douglas, J., concurring):

The State by the device of the loyalty oath places the burden of proving loyalty on the citizen. That procedural device goes against the grain of our constitutional system, for every man is presumed innocent until guilt is established.

See also, *Veeder II*, *supra* p.11, at 33:

In its vital aspect the right to reputation is not concerned with fame or distinction. It has regard . . . to that repute which is slowly built up by integrity, honorable conduct, and right living. One's good name is therefore as truly the product of one's efforts as any physical possession; indeed, it alone gives to material possessions their value as sources of happiness.

In most cases reputation reflects actual character. Such is the condition which best serves the interests of society, and which the individual may reasonably demand. Since the right is only to respect so far as it is well founded, it is obviously not infringed by a truthful imputation. *But the law justly deems any derogatory imputation false until it is shown to be true.*

18. The *amicus* briefs make this fallacious argument in even stronger terms. *Capital Cities Communications, Inc., et al.*, at 19, describes the issue as shifting the ultimate burden of persuasion on whether speech is constitutionally protected. The American Civil Liberties Union, *et al.*, at 11, says that placing the burden of proving truth on the defendant will require him to consider not only the truth of his publication, but whether he can prove it in court. The AFL-CIO, at 7 n.3, calls the decision below a holding that requires the defendant to prove truth to avoid liability. And the Print and Broadcast Media, at 8, go so far as to say that "[a] defamatory statement

(Continued)

publisher never has to prove truth to escape liability. That was the whole point of *Gertz*. When Justice Powell said that "[a]llowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties," 418 U.S. at 340, he acknowledged the Court's sensitivity to these concerns. When he then held that the States could "not impose liability without fault . . .," 418 U.S. at 347, he addressed those concerns and set forth the remedy. But the argument of self-censorship as framed by appellants and their *amici* are made as if *Gertz* had never been decided.

Most of the States have interpreted the fault requirement of *Gertz* to mean negligence. Therefore, all a publisher has to do is show that he reasonably believed that what he wrote was true. Bayer, *Defamation: Extension of the "Actual Malice" Standard to Private Litigants*, 59 Chi.-Kent L.Rev. 1153, 1173 (1983). Indeed, since the publisher does not have the burden of persuasion on this issue, he does not even have to convince the jury—he just needs to leave it equally balanced. *Regardless of the decision in the instant case*, a publisher will never have to prove truth to escape liability unless all of his other defenses, including lack of fault and the various privileges available under state law, have failed.

Furthermore, the fear of self-censorship is not supported by the evidence. In the conclusion of their brief, appellants argue that "[v]igorous debate on public issues should not be stifled by requiring a publisher to bear the burden of proving to a legal certainty each word which is written." (Appellants' Brief at 38.) Leaving aside the hyperbole of this statement, appellants probably meant to argue that, even with the protection of the fault requirement of *Gertz*, freedom of the press will be unduly restricted if a publisher who elects to defend a libel claim based upon actual truth, rather than a reasonable belief

NOTE 18—(Continued)

that is presumed to be false . . . subjects the defendant to liability without any further proof."

Although they do not describe it as such, appellants and their *amici* presumably only object to *undue* self-censorship, and acknowledge that a certain level of self-censorship represents nothing more than responsible reporting. Topping, *supra* p. 28, at 87, 89.

in truth, is put to the task of proving his defense. Other than a repeated lament by the organized media extending back over a number of years, there is no evidence to support this concern. Indeed, the evidence is to the contrary.

In Franklin, *Suing Media for Libel: A Litigation Study*, 1981 Am. Bar Found. Res.J. 795, a study of 291 reported defamation cases between January, 1977 and December, 1980, the author found that the plaintiff obtained a judgment which he was able to sustain on appeal in just 10 cases, a success rate of only 3.4%. *Id.* at 829. The author found that "[a]mong defendants, we noted that not a single broadcaster suffered an adverse judgment—even at the trial stage. . . . [E]ven the print media lost relatively few cases examined in this study." *Id.* at 830. In a later article, Professor Franklin said:

In all, plaintiffs who sue media defendants ultimately get and keep judgments in five to ten percent of all libel cases, and most obtain relatively small dollar awards. Even adding in settlements,¹⁹ this may be the most dismal performance record for plaintiffs in all areas of tort law.

Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L.Rev. 1, 4-5 (1983). This conclusion is confirmed by the most recent findings of the Libel Defense Resource Center that nearly three out of every four libel cases are dismissed on summary judgment. LDRC Bull. No. 13, 10-11 (Spring, 1985). The LDRC also found that the damage awards which survive post-trial motions and appeals "continue to be relatively small, and even appear on average to be decreasing." *Id.* at 4.²⁰

19. Franklin also cited data from one insurer. Of 118 libel cases closed in 1979, plaintiffs won three judgments, and 30 other cases were settled for payments ranging from \$300 to \$50,000 with the median payment being \$4,500. Franklin, 1981 *Amer. Bar Found. Res.J.*, at 800 n.12.

20. The *Amicus* Brief of Capital Cities Communications, Inc., *et al.*, at 13, quoted statistics that, from 1982-84, five damage verdicts exceeded \$1,000,000, and eight exceeded \$100,000, citing LDRC Study No. 5, LDRC Bull. No. 11, 16 (Summer-Fall, 1984). What that brief neglected to add was that the same study concluded that "the awards which survive post-trial motions and appeals continue to be relatively small," with no million dollar award finally affirmed on appeal. *Id.* at 3.

On the particular question of self-censorship, Professor Franklin said:

Certainly, despite adverse legal developments in recent years, investigative reporting is still being done, especially by the large newspapers. If the leaders of the media were to assert that the fear of libel suits and their accompanying expenses had a negative impact on reporting practices, the public would, rightly, be skeptical. In fact, prestigious publishers and broadcasters assert that libel law has not deterred them from practices they think appropriate.

* * *

The problem, then, is that it is virtually impossible to identify the causes of any decrease in investigative journalism or controversial stories. The uncertainty is exacerbated by the absence of examples from members of the press of stories they have killed or not pursued because of concern about being sued for libel.

Franklin, 18 U.S.F. L.Rev. at 15-17.

Moreover, the self-censorship argument is a strange one to be made in the context of allocating the burden of proving truth or falsity. The media's fear of self-censorship arises not from the fear of error, but from the fear of large damage awards, particularly those involving potentially uninsured punitive damages. The issue of the escalating cost of litigation, with its concomitant demands upon the time of the people involved, is only a subsidiary concern, because if the potential for large damage awards were not as great, the amount of money and time spent on defense would be correspondingly reduced. But the presumption of a good reputation, from which follows the presumption of falsity, "does not necessarily have to be translated into any monetary recovery for the plaintiff." LeBel, *Defamation and the First Amendment: The End of the Affair*, 25 Wm. & Mary L.Rev. 779, 785 (1984). The presumption of falsity is not the same as a presumption of damages, which Gertz disallowed absent proof of actual

malice.²¹

It thus appears that the media's undocumented fear of self-censorship is belied by the available evidence. While rules which contribute to undue self-censorship certainly should not be looked upon with favor, the absence of empirical data or any other type of proof to support the media's claims is itself evidence that self-censorship is not a serious post-Gertz problem. This is particularly so where the available empirical evidence shows that "truth [is] rarely a crucial defense." Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 Amer. Bar Found. Res.J. 455, 494. Certainly the evidence is insufficient to induce the Court to further constitutionalize the law of defamation. As Justice White said in *Dun & Bradstreet*, 53 U.S.L.W. at 4873 (concurring opinion), "I cannot assume that the press, as successful and powerful as it is, will be intimidated into withholding news that by decent journalistic standards it believes to be true."

B. Established Constitutional Principles Will Be Best Served by Leaving the Allocation of the Burden of Proving Truth Or Falsity to the States.

The thrust of *Gertz* was that "the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." 418 U.S. at 345-46. But for the requirement of "fault," and the limitations on damages, the Court has opted to leave to the States the development of the law of private figure defamation. Rejection of appellants' request to impose a constitutional requirement that a private figure plaintiff prove falsity follows naturally from that decision.

(1) *The Example of Pennsylvania*

The wisdom of this decision is well-illustrated by the ex-

21. The confusion of these concepts is reflected in the *Amicus* Brief submitted on behalf of Capital Cities Communications, Inc., *et al.*, at 5-6, where the burden of proof rule at issue in this case is erroneously described as "a rule permitting damages for the utterance of speech that is true."

ample of Pennsylvania. This is a Commonwealth whose libel law has not followed the mainstream. Pennsylvania was the first State to provide in its Constitution that truth was a defense to a libel prosecution. Pa. Const. of 1790, art. 9, §7.²² The Constitution of 1873, in §7 of the Declaration of Rights, extended the protections accorded to the press by excusing the publication of defamatory matter upon a showing that it was proper for public information and not published maliciously or negligently.²³ The requirement of negligence, with the burden of proving it being placed upon the plaintiff, has also applied to Pennsylvania civil defamation actions since at least the late nineteenth century. *Neeb v. Hope*, 111 Pa. 145, 151-52, 2 A. 568, 570-71 (1885); *Clark v. North American Co.*, 203 Pa. 346, 351-52, 53 A. 237, 239 (1902); *Wharen v. Dershuck*, 264 Pa. 562, 566, 569, 108 A. 18, 19-20 (1919); *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 192, 8 A.2d 302, 307 (1939); *Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167, 179-81, 191 A.2d 662, 668-69 (1963); *Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404, 410 n.3 (E.D. Pa. 1983). It was codified by the General Assembly in 1901. 42 Pa. Cons. Stat. §8344 (originally enacted in Act of April 11, 1901, P.L. 74, §3, 12 Pa. Stat. §1583) provides:

22. That provision, which was carried forward without change in the Constitution of 1838, provided in relevant part:

In prosecution for the publication of papers investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence

23. The provision in question stated:

The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where

(Continued)

In all civil actions for libel, no damages shall be recovered unless it is established to the satisfaction of the jury, under the direction of the court as in other cases, that the publication has been maliciously or negligently made, but where malice or negligence appears such damages may be awarded as the jury shall deem proper.²⁴

At the same time it was extending these protections to the press, Pennsylvania was not ignoring individual reputation. The Constitutions of 1790 (art. 9, §1), 1838 (art. 9, §1), 1873 (art. 1, §1), and 1968 (art. 1, §1) were explicit in protecting "reputation" as an inherent and inalienable right. The current Pennsylvania Constitution, enacted in 1968, states in article 1, §1 of the Declaration of Rights (the very first paragraph of that document):

§1. *Inherent Rights of Mankind.*

All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of *acquiring, possessing and protecting* property and *reputation*, and of pursuing their own happiness.

NOTE 23—(Continued)

the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

24. By twisting the language of the *Hepps* opinion, the *Amicus* Brief submitted on behalf of Capital Cities Communications, Inc., *et al.* argues that the Pennsylvania negligence standard relates only to negligence in the act of publishing the defamation, and therefore does not meet the *Gertz* standard because it does not relate to fault in determining truth. This argument is completely erroneous. In 1939, the Pennsylvania Supreme Court said in *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. at 192:

a close examination of the Pennsylvania law will show that our rule is not one of absolute liability, but rather, of a very strict standard of care to *ascertain the truth* of the published matter.

Accord, *Clark v. North American Co.*, 203 Pa. at 351 ("[e]ven in reporting an occurrence proper for publication there may be such an absence of the required diligence and care to *ascertain the truth* as to make the report libelous").

§11 of the Declaration of Rights provides:

All courts shall be open; and every man for an injury done him in his lands goods, person or *reputation* shall have remedy by due course of law . . .

Considering these constitutional provisions, it is the law of Pennsylvania that "[t]he rights of the [publisher] and of the [persons] alleged to have been libeled in this case . . . rest on the same constitutional ground. They demand an exact balance of the scales of justice. . . ." *Commonwealth v. Swallow*, 8 Pa. Super. 539, 603 (1898).

The other major factor which enters into the unique equation which is the Pennsylvania law of libel is the existence, since 1937, of a very broad Shield Law protecting sources of information. 42 Pa. Cons. Stat. Ann. §5942.²⁵ This statute has been interpreted very broadly. *In Re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963). As interpreted, the scope of the protection afforded by the Shield Law is solely determined by the reporter; the identity of any source which the reporter does not actually publish or publicly disclose shall remain confidential. *Id.* at 44.

No mechanism exists to limit a reporter's potential abuse of this privilege. The instant action is a case in point. In pre-trial proceedings, the trial court ruled that the Shield Law was applicable to civil libel actions, and gave the reporter-defendants the unfettered discretion to refuse to identify any and all sources of information. *Hepps v. Philadelphia Newspapers, Inc.*, 3 Pa. D.&C. 3d 693 (1977).²⁶ During the trial, the reporters repeatedly exercised that right from the witness stand, all the while relying upon information from those confidential

25. 42 Pa. Cons. Stat. Ann. §5942(a) provides:

No person engaged in, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

26. The Opinion is reproduced in the Joint Appendix beginning at page A26.

sources to support the truth of their articles. The trial judge, consistent with his pre-trial ruling, did not direct the reporters to answer, thereby giving tacit, if not explicit, approval to their refusal to respond. Plaintiffs accordingly submitted, in the alternative, two proposed points for charge,²⁷ either of which would have instructed the jury that it could, if it wished, draw inferences adverse to defendants by their failure to identify sources. Plaintiffs argued that the trial court should at least instruct the jury that it need not accept the reporters' assertion of the Shield Law with blind faith; that the jury should itself examine the reporters' claims of privilege in light of all the facts in the case; and that it could conclude that the reporter was not really trying to protect confidential sources, but rather to use the Shield Law to prevent plaintiffs from challenging the existence, reliability and credibility of the sources themselves, because the reporter felt that such a challenge might succeed. However, the trial court refused to give either requested instruction because of its fear that "to charge the jury in such a fashion would effectively emasculate the so-called Shield Law of Pennsylvania." (Joint Appendix at A144.)

In commenting upon the impact of the Shield Law, the Pennsylvania Supreme Court, in its decision in this case, stated:

As a consequence of this greater protection to the media defendant provided by the "shield law" the plaintiff in a civil libel action is restricted in his ability to prove the falsity of the defamatory statement. He is denied access to the sources of information on which the statement is based.

(Joint Appendix at A175.)

Finally, it is important to remember that the rule that the defendant has the burden of proving truth has been part of Pennsylvania decisional law since at least 1847. *Steinman v. McWilliams*, 6 Pa. 170 (1847).²⁸ It is a rule that has long blended in with the rules described above, and many others,²⁹ to complete the matrix of Pennsylvania libel law.

27. These are reproduced in the Joint Appendix at A92 and A93.

28. See cases cited by the Pennsylvania Supreme Court at Joint Appendix A156.

29. Such as the rule that evidence of the plaintiff's good character or

(Continued)

Against this background, with intimate knowledge of the unique matrix described above, the Pennsylvania Supreme Court concluded that "[t]he right to criticize must carry some degree of responsibility, particularly where it may jeopardize the reputation of a private citizen." (Joint Appendix at A174.) Having previously concluded, for reasons similar to those stated in Part I of this brief, that *Gertz* does not preclude a State from placing the burden of proving truth on a defendant, the Pennsylvania Supreme Court held that this ancient common law rule, approved by the Pennsylvania General Assembly, when considered in the context of other Pennsylvania rules relating to libel law, including the fact that it co-existed for the better part of this century with a fault requirement and a broad Shield Law, "makes a constitutionally acceptable accommodation between the freedom of expression required by the First Amendment and our law of civil libel for compensatory damages brought by a private individual to redress defamatory falsehood." (Joint Appendix at A172.)

The wisdom of this accommodation is well-illustrated by the case at bar. For example, in the second news article, in a sentence which plaintiff Hepps testified was particularly damning (Tr. 2255-57), defendant Ecenbarger wrote:

The [Federal] investigators have found connections between Thrifty and underworld figures.

(Joint Appendix at A65.) To prove this statement false, plaintiffs would have to prove:

- (a) that the unnamed "underworld figures" were not underworld figures;
- (b) that Thrifty had no "connections" with these "underworld figures"; and
- (c) that the unidentified "federal investigators" had no evidence, whether good or bad, of these "connections."

Since plaintiffs were denied the right to learn who the federal investigators were, they were doubly hamstrung: they could

NOTE 29—(Continued)

reputation is not admissible until the defendant has attacked it in court. *Clark v. North American Co.*, 203 Pa. 346, 353 (1902).

not question the investigators to see if they indeed had such evidence, and they could not respond to that "evidence" to prove it false. The only way that plaintiffs could sustain their burden of proving falsity was to challenge the credibility of the reporters for refusing to identify those sources. But the trial court eliminated this possibility by refusing to charge the jury concerning the adverse inferences which the jury could permissibly draw from defendants' failure to identify their sources.

In short, the trial court put the burden of proving falsity on plaintiffs but denied to them the means to sustain that burden. Since §11 of the Pennsylvania Declaration of Rights assures that every person "shall have remedy by due course of law" for "any injury done him in his . . . reputation," the combined rulings of the trial court raised serious due process issues under the Pennsylvania Constitution which were argued by plaintiffs in their appeal to the Pennsylvania Supreme Court. Those issues did not have to be reached, however, because of the court's proper conclusion that placing the burden of proving truth on a defendant did not violate the federal Constitution.³⁰

(2) *The Historical Rule that the Defendant Has the Burden of Proving Truth Best Serves The Competing Interests of Reputation and Free Press.*

There are numerous social benefits to the traditional rule³¹ that the burden of proving truth should be on the defendant, several of which have been adverted to throughout this brief. While, as noted earlier, *supra* n.12, these social benefits are policy arguments which do not raise constitutional issues, they are nonetheless worthy of mention as additional reasons for the Court not to create a constitutional requirement that a plaintiff prove falsity.

30. For a good summary of how, since *Gertz*, several other states have established rules applicable to defamation which consider those states' unique circumstances, see Cohen, *Libel: State Court Approaches in Developing a Post-Gertz Standard of Liability*, 1984 Ann. Surv. of Am. L. 155.

31. The *Amicus* Brief of Print and Broadcast Media and Organizations
(Continued)

The most significant policy reason supporting the traditional rule is that it flows naturally from the presumption of innocence and the importance of protecting the individual and his rights.³² The basic, fundamental and indeed constitutional stature of the right to protect reputation, equal to the right of freedom of the press, is what distinguishes defamation law from the rule in Title VII cases to which appellants draw an analogy in their brief, at 29-31.³³ A further basis for distinguishing the Title VII cases is that the rule of *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), is not a rule of constitutional imperative, but only of statutory interpretation. States are, and should be, free to adopt a *Burdine* rule in libel cases if they so choose. But there is nothing in *Burdine*, or in the Title VII analogy, that should constitutionally compel them to do so.

The question of fairness is relatively straightforward. Maurice Hepps awoke one morning, opened his copy of *The Philadelphia Inquirer*, and saw that the leading morning

NOTE 31—(Continued)

repeatedly describes this rule as the "Pennsylvania Rule" (*Amicus* Brief at 5, 10, 16-19, 23-25) as if it was a "new element" (*Amicus* Brief at 17) thrust upon the already beleaguered libel defendant. The bulk of its argument proceeds from that assumption. To the contrary, as shown in §1.A of this Argument, the "Pennsylvania Rule" has been a uniform rule of Anglo-American jurisprudence, with the exception of a short period of time in the 17th and 18th Centuries, for close to 1000 years. In fact, this *Amicus* Brief so consistently misstates the law, and overstates its arguments, that the only purpose it serves is to confuse rather than elucidate the issue before the Court.

32. The *Amicus* Brief of the ACLU, *et al.*, at 16, suggests that the presumption of falsity of defamatory statements derives from the common law of libel. However, the Pennsylvania Supreme Court said it derives from the presumption of innocence. (Joint Appendix at A158.) Regardless of the ACLU's denigration of "the common law of libel," it presumably will acknowledge the importance of the presumption of innocence.

33. Appellants' argument based on the analogy to trade disparagement cases, where the burden of proving falsity is on the plaintiff, is also easily distinguishable because the interest in protecting the reputation of one's product clearly cannot be equated with the right to freedom of speech. *Young v. Geiske*, 209 Pa. 515, 519, 58 A. 887, 888 (1904). But the case at bar is not trade disparagement, it is libel.

newspaper in the fifth largest city in the country had trumpeted the "fact" that "[federal] investigators have found" that his company, Thrifty Beverage, had "connections" with "underworld figures." (Tr. 2120-21.) In the face of this public accusation, he was confronted with the extraordinary task of proving to the world the amorphous negative proposition that he was not connected with organized crime.³⁴ Unable to achieve vindication in the *Inquirer*, Hepps was forced to go to court, where he was entitled to expect that he would be given a fair chance to clear his name.

Libel is the tort of wrongful public accusation of wrongdoing. Our society is founded upon the proposition that the accuser must prove the truth of his accusations. Fairness dictates, and Hepps had the right to anticipate, at least that much. Furthermore, especially in view of the broad Shield Law protections available in Pennsylvania and elsewhere, the accuser best knows the facts upon which his accusations are based, and is therefore best able to supply that proof in court. To the extent he has difficulty, modern discovery rules are as available to a libel defendant as they are to a libel plaintiff, and the plaintiff does not have the ability to resist that discovery by invoking a Shield Law privilege.

While British commentary on this issue is not entirely applicable because fault is not a prerequisite to recovery in Great Britain, the Report of the Committee on Defamation, Cmd. No. 5909, Paragraph 141, at 36 (1975), had this to say on the policy considerations involved in shifting the burden of proving truth or falsity:

Perhaps the most radical suggestion of all made to us was that the burden of proof should be shifted so that a defendant would have a defense unless the plaintiff could disprove the truth of the allegations. We are firmly opposed to this suggestion. We think that the principle requiring a publisher of defamatory words to prove their truth (subject of course to other defenses like qualified privilege) is a sound principle. It tends to inculcate a spirit of caution

34. For examples of the difficulties in trying to prove a negative, see Tr. 2538-39, 2544.

in publishers of potentially actionable statements which we regard as salutary, and which might well be severely diminished if the burden of proof were shifted. Moreover, such a shift would, we think, severely upset the balance of the law of defamation against defamed persons.

As Justice Brennan recently said in a related context in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 53 U.S.L.W. 4866, 4878 (U.S. June 25, 1985) (No. 83-18) (Brennan, J., dissenting), "[t]he common law[s] . . . accumulated learning is worthy of respect."

(3) *The Need to Maintain Flexibility.*

There is dissatisfaction with the current state of the law of libel among commentators and interested groups on both sides of the issue. As the *amici* briefs submitted on behalf of appellants in this case indicate, the media feel that, under the present state of the law, they are too exposed to the uncontrolled discretion of juries in awarding substantial damages and, even in those cases where they prevail, they are forced to incur substantial legal fees defending actions that, in their view, ought never to have been filed. Plaintiffs, for their part, despair over the difficulties they have under present law in rapidly and completely vindicating their good names, and the substantial costs they must incur in doing so. As a result, there have appeared in recent years a plethora of proposals for reform, involving the need for new state legislation to modify procedures, to assure speedy trials, to create new forms of action such as a declaratory judgment to establish falsity, and so forth. See, e.g., *Franklin*, 18 U.S.F. L.Rev. at 29, *et seq.*; *LeBel*, 25 Wm. & Mary L.Rev., at 788, *et seq.*; *Lewis*, 83 Colum. L.Rev. at 615-18.

As a corollary, this Court should be loathe to further constitutionalize the law of private figure libel absent a truly compelling showing of need.³⁵ This is so because each new constitutional requirement means one less area in which the States can experiment with new ways to keep in balance the

35. The unbroken trend of decisions by this Court since *Gertz* has shown agreement with this proposition. *Time, Inc. v. Firestone*, 424 U.S.

competing interests of individual reputation and freedom of the press. No such compelling showing of need has been made by appellants in this case.

NOTE 35—(Continued)

448 (1976); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 53 U.S.L.W. 4866 (U.S. June 25, 1985). See, *LeBel*, at 780-81.

III. CONCLUSION

Rather than focusing on the federal constitutional limitations on a state's tort law, the next rounds of the defamation debate are likely to resemble the controversy in some other branches of tort law. In these next rounds, the reconciliation of competing interests is going to be made within the constraints of the political process. Rather than subjecting reputational interests to a first amendment trump, the participants in this debate ought to be increasingly responsive to more popular notions of the fair treatment of individuals and the control of largely unchecked institutions capable of inflicting serious harm.

Lebel, 25 Wm. & Mary L.Rev., at 782. These comments are particularly pertinent to the issue raised by this case. From the manorial and ecclesiastical courts of England, through the courts of common pleas, to a colonial courtroom where John Peter Zenger was acquitted, to the newly-formed state courts and legislatures where the aberrations of the Star Chamber were quickly discarded, to today's society of instantaneous worldwide mass communication, the concepts of freedom of speech and the press and the sanctity of individual private reputation have come to be identified as important goals of democracy and freedom. When in our history one has been favored over the other, both have suffered grievously. In England in the 17th Century, when the Star Chamber glorified reputation to the extent that truth became "not material," the free press was completely suppressed, and the individual rights of the common man were sharply restricted. More recently, when public defamation in the name of national security became a way of life, speech was seriously repressed as well. As Justice Stewart said:

The rights and values of private personality far transcend mere personal interests. Surely if the 1950s taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society.

Rosenblatt v. Baer, 383 U.S. at 93-94 (Stewart, J., concurring).

Favoring freedom of the press over individual private reputation by constitutional fiat cannot be what the Framers had in mind. The ruling requested by appellants would fly in the face of hundreds of years of common law experience, of the framework of individual rights protected by the Bill of Rights, of public policy, and of basic notions of fairness. Zenger, after all, did not insist that the Crown prove him false. He asked only for the right to prove that what he wrote was true.

For the reasons stated above, appellees request that the judgment of the Supreme Court of Pennsylvania be affirmed.

Respectfully submitted,

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No. 84-1491

In the Supreme Court of the United States

OCTOBER TERM, 1984

PHILADELPHIA NEWSPAPERS, INC., *et al.*,

Appellants,

v.

MAURICE S. HEPPS, *et al.*,

Appellees.

On Appeal from the Supreme Court
of Pennsylvania

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

INTRODUCTORY STATEMENT

We have argued that defendants' First Amendment interest in being free from sanctions for speech not shown to be false demonstrably outweighs any interest of the state in giving a defamation plaintiff the enormous advantage of presuming, rather than proving, the key element of his case—*i.e.*, the falsity of the publication. None of plaintiffs' arguments is sufficient to justify the result they seek to have affirmed by this Court.

1. Plaintiffs rely (Br. 19-20) on dictum in a privacy case stating that it was an open question whether liability for defamation could be based on a true statement. *Cox Broad-*

casting Corp. v. Cohn, 420 U.S. 469, 490 (1975). The *Cox Broadcasting* opinion, however, while expressly declining to rule on this issue, did hold that liability in a privacy action could not be premised upon the accurate publication of information obtained from the public record. *Id.* at 491. Moreover, Justice Powell, who had written the majority opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), strongly asserted that no liability for truth was permissible after *Gertz*. 420 U.S. at 497-500.

One year after the decision in *Cox Broadcasting*, the Court stated that "demonstration that an article was true would seem to preclude finding the publisher at fault," citing Justice Powell's concurrence in *Cox Broadcasting. Time, Inc. v. Firestone*, 424 U.S. 448, 458 (1976). Moreover, the Court has expressly stated that private persons as well as public figures cannot recover without proof of falsity. *Herbert v. Lando*, 441 U.S. 153, 175-176 (1979).

This Court's position in criminal libel cases should now be made explicitly applicable to civil libel actions: "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). Indeed, the entire focus of *Gertz* was the protection of truth and what defendant reasonably believed to be truth, even to the point of depriving plaintiff of a remedy for some falsehoods. The First Amendment, which protects even some falsehood in order to promote open debate on matters of public concern, necessarily protects all speech not proven false.

2. In performing the "balancing of interests" mandated by this Court's opinions,¹ plaintiffs contend that the "penumbra" of various constitutional provisions puts a plaintiff's reputational interest on the same footing as defendant's free speech and press interests under the First and Fourteenth Amendments (Br. 27). Plaintiffs' "penumbra" argument is based on a collection of isolated sentences from various opinions which essentially state that an individual has a strong

1. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 86 L.Ed.2d 593, 601 (1985); *Gertz, supra*, 418 U.S. at 342-348.

interest, under our constitutional system, in protecting his good reputation.

Without in any way denigrating the importance of plaintiffs' reputational interests, those interests do not rise to the level of a property right protected by the Fourteenth Amendment. Plaintiffs' assertions about the constitutional weight of their interests are belied by the rulings of *Gertz* and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), upheld in numerous subsequent cases, that a plaintiff may not necessarily recover even when a defendant has injured plaintiff's reputation by false statements. The First Amendment's guarantee of the right to uninhibited and robust debate on matters of public concern has clearly been held to outweigh plaintiff's right to protect his reputation from demonstrably false accusations. The First Amendment right thus obviously outweighs plaintiff's reputational interest when it comes to true statements or statements which have not been proven false.

Whatever the relative strength of a plaintiff's reputational interest, it does not rise to a "liberty" or "property" right within the meaning of the Fourteenth Amendment. *Paul v. Davis*, 424 U.S. 693, 711-712 (1976). The right to free speech and press, on the other hand, has long been recognized as such a "liberty" interest. *Near v. Minnesota*, 283 U.S. 697, 707 (1930). Indeed, freedom of speech and press are protected against abridgement by a state precisely because they are "among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

3. Although plaintiffs contend that defendants have no need for a rule requiring plaintiffs to prove falsity (Br. 32-36), the fact is there is a very real risk of self-censorship in the absence of such a rule.

Plaintiffs emphasize that, since *Gertz*, a plaintiff may not, in any event, recover without establishing fault. But that fact does not obviate the necessity of requiring a plaintiff to prove falsity. The negligence requirement² simply does not ade-

2. Pennsylvania has adopted negligence as its fault requirement, *Rutt*

quately protect a libel defendant's freedom of speech because negligence is so easily found by jurors and is virtually unreviewable by the appellate courts. See Libel Defense Resource Center (hereafter LDRC) Bulletin No. 6, 43 (1983). As one commentator warned shortly after the *Gertz* decision, the hope that a traditional negligence standard "will prevent unnecessary self-censorship is illusory":

No one with the slightest appreciation for the myriad uncertainties of common law negligence would rely on the belief that reasonable care will preclude an adverse verdict. If the common law concept of negligence is applied to defamation, the extent of a publisher's constitutional protection will depend on a jury's relatively unfettered, ex post facto appraisal of his conduct, and since the publisher has no way of knowing how large the jury will make the prohibited zone, he has no choice but to steer wide of it.

Anderson, *Libel and Press Self-Censorship*, 53 Tex. L.R. 422, 460-461 (1975).

The prediction that common law negligence would not sufficiently protect the defendant's constitutional interest has proven true. Once a jury, by presumption or otherwise, finds against a defendant on the truth issue, it will almost automatically find the requisite negligence to hold defendant liable. "[F]alsity triggers the liability." Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L.Rev. 1,7 (1983) (footnote omitted). "After all, if the story is false, some further check would almost certainly have shown this—and the plaintiff seizes on the most plausible of these unmade inquiries." Franklin, *supra*, 6 Comm/Ent L.J. at 278 (emphasis in the original). Moreover, "jurors are willing to impose lia-

v. Bethlehem Globe Publishing Co., 335 Pa. Super. 163, 484 A.2d 72 (1984), as have most states which have addressed the issue. See Franklin, *What Does "Negligence" Mean in Defamation Cases?*, 6 Comm/Ent L.J. 259, 264-265 (1984). Ordinary common law negligence is generally the test, rather than a standard relating to professional journalistic practices. *Id.* at 265-266.

bility on virtually all cases of claimed negligence." *Ibid.* (See Print and Broadcast Media and Organizations Amicus Curiae Br. 5-21). In short, a finding of falsity often results in a finding of negligence and the imposition of liability on the media defendant. When falsity is presumed, virtually nothing, except litigation costs, stands between the filing of a libel suit and the return of a verdict in favor of a private defamation plaintiff.

Therefore, the burden of proof on falsity is indeed crucial. As this Court has repeatedly recognized, "where the burden of proof lies may be decisive of the outcome" of a particular case. *Speiser v. Randall*, 357 U.S. 513, 525 (1958) (citations omitted). Accord: *Lavine v. Milne*, 424 U.S. 577, 585 (1976). That is certainly true as to the burden of proof on the fundamental libel issue of falsity.

4. Plaintiffs do not dispute, but would summarily dismiss as mere "policy arguments," defendants' demonstration that it is not inequitable to require a private plaintiff to prove falsity (Br. 25 n. 12). Plaintiffs cannot so easily evade the force of such arguments, however, because the balancing test requires the Court to determine whether plaintiffs' interests are sufficient to overcome defendants' First Amendment rights. For all the reasons stated in our opening brief, the burden of persuasion on the key issue of falsity belongs with plaintiffs, in light of defendants' strong constitutional interest in freely discussing public affairs and the fairness and practicality of allocating to plaintiffs the burden of proof on falsity.

Private individuals are just as capable of carrying the burden of persuasion on falsity as are public figures.³ A state's interest in providing more protection to private persons than to public ones (see *Gertz*, 418 U.S. at 345), is therefore fully

3. The extensive evidence plaintiffs were able to produce during the six-week trial in this case belies their argument (Br. 39-42) that they were deprived, by virtue of the Pennsylvania Shield Law, of a full and fair opportunity to try to carry the burden of proof. (See Appellants' Br. 10-11; 36-37). Moreover, any complaints concerning the Shield Law should be addressed in the first instance to the Pennsylvania Legislature rather than to this Court.

accommodated by permitting the state to adopt the lower fault standard.

Dropping the fault standard from actual malice to negligence gives private plaintiffs a demonstrable advantage over public figure plaintiffs. First, private persons are much more likely to succeed in resisting summary judgment. See LDRC Bulletin No. 6, *supra*, at 41. Second, they are much more likely to prevail than plaintiffs subject to the *New York Times* standard. Franklin, *supra*, 6 Comm/Ent L.J. at 272. As a recent LDRC study demonstrated, a plaintiff's verdict in a libel action brought by a private individual is rarely overturned on appeal solely on the ground that a finding of negligence was erroneous. LDRC Bulletin No. 6, *supra*, at 42. Comparable data in actual malice cases, on the other hand, showed that defendants were able to overturn "actual malice" findings in nine of fourteen cases." Franklin, *supra*, 6 Comm/Ent L.J. at 272, citing Franklin, *Suing Media for Libel: A Litigation Study*, 1981 Am. Bar Found. Res. J. 797, 824-825. The state's greater interest in protecting a private plaintiff's reputation is thus adequately served by the lower standard of fault the state may choose to require.

5. Plaintiffs are equally in error in relying (Br. 34) on win-loss statistics which show that media defendants quite often prevail on appeal. In the first place, this ignores the fact that the costs of winning a libel case are often staggering. At trial, "jurors rule against media defendants eighty-five percent of the time. This startling figure is higher than in any other tort litigation area." Franklin, *supra*, 18 U.S.F. L.Rev. at 4. Admittedly, defendants fare much better on appeal (see Appellees' Br. 34), but appeal by definition means that the case has been discovered and tried. Secondly and significantly, these statistics are based on a universe of cases which includes both public official/figure cases and private person cases from jurisdictions which, after *Gertz*, often have required the plaintiffs to bear the burden of proving falsity (see Appellants' Br. 19 & n. 9). They therefore are of little assistance in forecasting the impact of placing the burden of proving truth on defendants.

6. Plaintiffs argue strenuously (Br. 36), that the focus of most libel cases has become the fault issue rather than truth or falsity—a result which may be the natural outgrowth of the *New York Times* and *Gertz* decisions.⁴ This argument equally supports our position that defendants run a real risk of being sanctioned for true speech. With the emphasis on fault rather than falsity, "it is more than theoretically possible for a plaintiff to win a libel action on the basis of a true statement . . ." A rule that the burden of proof is on defendant "and that the plaintiff need not prove falsity other than, at most, by alleging it in the complaint" contributes to the possibility of winning on the basis of a true statement, "for the rules of evidence and pleading permit an action to proceed without any substantial assessment of the actual truth or falsity of the challenged statement." Bezanson, Cranberg and Soloski, *Libel and the Press, Setting the Record Straight* 33-34, 1985 Silha Lecture, University of Minnesota (May 15, 1985).

7. Defendants have argued (Br. 32-33) that it is unconstitutional to *presume* the key element of falsity based on proof of defamatory speech because of the absence of the requisite "rational connection" between the proven and presumed fact. Plaintiffs assert (Br. 30) that the "rational connection" rule applies primarily in criminal cases. But the rule applies equally in civil cases where, as here, Fourteenth Amendment property or liberty interests are affected. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976); *Western & Atlantic R. Co. v. Henderson*, 279 U.S. 639, 642 (1929); *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910).⁵

Although plaintiffs attempt to rely on *Lavine v. Milne*, *supra*, to deflect the rational connection argument, that decision actually supports defendants' position. *Lavine* upheld a welfare statute which provided that a person who applied for

4. See Franklin, *supra*, 1981 Am. Bar Found. Res. J. at 820.

5. Plaintiffs also rely on various civil decisions of Courts of Appeals employing or approving presumptions based on policy (Br. 30-31). As the cases cited above show, however, this Court has assessed the constitutionality of statutory presumptions under the rational connection test.

benefits shortly after quitting a job was "deemed" to have quit in order to qualify for benefits, and was therefore ineligible for relief under statutory rules. The Court upheld the provision, finding that it involved no true "presumption." 424 U.S. at 584. The Court emphasized that, unlike other cases invalidating presumptions under the rational connection test, the provision at issue in *Lavine* did not shift the burden of proof from one party to another. Rather, the provision merely made clear that a welfare applicant must prove all essential elements of his case, much as "a tort or contract plaintiff [must] prove an essential element of his case." *Ibid.*

In this case, that sensible result can only be achieved by invalidating the Pennsylvania burden of proof statute which rests on an irrational presumption that *does* shift the burden. Reversal of the decision below will require a plaintiff alleging the tort of libel to prove the essential element of falsity rather than presuming falsity from the unrelated fact of a defamatory statement. Here, the challenged statute does shift the burden of proof on an element of plaintiffs' case, unlike the statutory provision in *Lavine*.

Although plaintiffs quote the statement in *Lavine* that the locus of the burden of persuasion is "normally not an issue of federal constitutional moment" (424 U.S. at 585), that statement was made in the context of welfare benefits, to which there is no constitutional entitlement. The Court emphasized that such benefits "are not a fundamental right, and neither the State nor Federal Governments are under any sort of constitutional obligation to guarantee" such benefits. *Id.* at 585 n. 9. This case, by contrast, involves fundamental constitutional guarantees, and the burden of persuasion on the key element of the case unquestionably rises to federal constitutional import.

CONCLUSION

For the reasons stated above, and in defendants' opening brief, the judgment of the Supreme Court of Pennsylvania should be reversed, and the cause should be remanded for reinstatement of the judgment on the verdict in favor of defendants.

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IN THE
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October Term, 1984

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Appellees.

On Appeal from the Judgment
of The Supreme Court of Pennsylvania

**MOTION OF CAPITAL CITIES COMMUNICATIONS,
INC., CBS INC., NATIONAL BROADCASTING
COMPANY, INC., TRIBUNE COMPANY, AND
WESTINGHOUSE BROADCASTING AND
CABLE, INC. FOR LEAVE TO FILE A
BRIEF AMICUS CURIAE AND BRIEF
IN SUPPORT OF APPELLANTS**

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984
No. 84-1491

PHILADELPHIA NEWSPAPERS, INC., *et al.*,
Appellants,
v.
MAURICE S. HEPPS, *et al.*,
Appellees.

On Appeal from the Judgment
of The Supreme Court of Pennsylvania

**MOTION FOR LEAVE TO FILE
A BRIEF AMICUS CURIAE**

Capital Cities Communications, Inc., CBS Inc., National Broadcasting Company, Inc. ("NBC"), Tribune Company, and Westinghouse Broadcasting and Cable, Inc. respectfully move for leave to file the accompanying brief as *amici curiae* in support of appellants Philadelphia Newspapers, Inc., *et al.* Appellants have consented to the filing of this brief, but appellees have not.

Each of the parties filing this motion, by itself or through its wholly-owned subsidiaries, broadcasts news and public affairs programming over television and radio stations owned or operated by it. Capital Cities, CBS, and Westinghouse each owns and operates a television station within Pennsylvania. CBS and NBC own and operate television and radio networks that provide news and public affairs programming to television and radio stations located within Pennsylvania and elsewhere

throughout the country. Capital Cities is a party to an agreement with American Broadcasting Companies, Inc. ("ABC") subject to approval by the Federal Communications Commission to become the owner of ABC's television and radio networks. All of the moving parties or their subsidiaries own and operate television and radio stations in major metropolitan markets outside of Pennsylvania, and, in addition to their television and radio holdings, Capital Cities and Tribune, or their subsidiaries, publish newspapers that are disseminated in and outside of Pennsylvania.

This appeal presents significant questions in the law of defamation. The decision by the Supreme Court of Pennsylvania upheld the validity of a Pennsylvania statute that required the defendants to prove the truth of a newspaper article relating to a matter of public concern. At least four other states follow a similar rule, and more than half of the states have yet to develop rules on this question since the decision of this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Under the burden allocation sustained by the court below, a publisher or broadcaster may be held liable for uttering true speech on an important matter of public interest because it was unable to persuade a jury of the statement's truth by at least a preponderance of the evidence. In addition, it can be held negligent in assessing the statement's truth on the basis, in part, of a presumption that the statement never was true at all. A decision by this Court affirming that allocation therefore would have a major effect on companies such as the moving parties herein that disseminate news and public affairs programming throughout the country.

The questions presented in appellants' jurisdictional statement relate to the constitutionality of the Pennsylvania statute insofar as it applies to newspapers. This Court's decision cannot be limited to newspapers, however. The Pennsylvania statute that was sustained by the

court below applies to all actions for defamation, including actions against broadcasters such as the parties to this motion. The constitutionality of the statute as it applies to broadcasters is a question of law that has not adequately been presented by the parties to this case and that, because of the statute's unrestricted scope, is relevant to its disposition. It is respectfully submitted that the attached brief *amicus curiae* by the broadcasters that join in this motion will provide the Court with additional insight into that question.

For the foregoing reasons, Capital Cities, CBS, NBC, Tribune, and Westinghouse respectfully request that the Court grant them leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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QUESTIONS PRESENTED BY THE APPEAL

1. Does not a Pennsylvania statute that requires a defendant publishing or broadcasting a matter of public concern to bear the burden of proving the truth of its publication or broadcast as a defense to a private figure defamation action violate the First Amendment and the Due Process Clause because it creates a significant risk that constitutionally protected speech will be punished erroneously?

2. Does not such a statute violate the rule of *Gertz v. Robert Welch, Inc.* by absolving the plaintiff of part of the constitutional requirement that it prove that the defendant acted with fault in assessing falsity?

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IN SUPPORT OF APPELLANTS**

Capital Cities Communications, Inc., CBS Inc., National Broadcasting Company, Inc. ("NBC"), Tribune Company, and Westinghouse Broadcasting and Cable, Inc., as *amici curiae*, submit this brief in support of appellants Philadelphia Newspapers, Inc., *et al.*, to urge that the judgment of the Supreme Court of Pennsylvania be reversed and that the judgment in favor of appellants by the Court of Common Pleas of Chester County, Pennsylvania be reinstated.

INTERESTS OF THE AMICI CURIAE

Capital Cities, CBS, NBC, Tribune, and Westinghouse, by themselves or through wholly-owned subsidiaries, own and operate television and radio stations in major metropolitan areas throughout the United States that broadcast news and public affairs programming. Capital Cities, CBS, and Westinghouse each own and operate television stations within Pennsylvania. CBS and NBC own and operate television and radio networks that provide news and public affairs programming to television and radio stations located within Pennsylvania and elsewhere throughout the country. Capital Cities has applied to the Federal Communications Commission for approval to merge with American Broadcasting Companies, Inc., which also owns such television and radio networks. Capital Cities and Tribune, or their subsidiaries, also publish newspapers that are disseminated in and outside of Pennsylvania.

The questions presented in this appeal have a major bearing on defamation law as applied in Pennsylvania to the publication of matters of public concern. Since each of the *amici curiae* publish and broadcast such matters on a daily basis within Pennsylvania, the decision in this case will affect each of them directly. In addition, since the holding of the court below is in accord with scattered decisions in other states and, if affirmed, is likely to be followed in an increasing number of states, the effect of this Court's decision on the parties to this brief extends far beyond their operations within Pennsylvania.

Appellants are a Pennsylvania newspaper publisher and its employees, but the decision of the court below applies to broadcasters as well. The parties to this brief are broadcasters, and they do a major portion of the news reporting in this nation. The special insights of electronic journalism may be of assistance to the Court in addressing the issues presented by this appeal.

STATUTE INVOLVED

This case involves the constitutionality of a provision of the Pennsylvania Judicial Code, 42 Pa. C.S. § 8343(b), which reads:

"In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

(1) The truth of the defamatory communication."

The provision is part of the Defamation Subchapter of the Judicial Code, 42 Pa. C.S. §§ 8341-8345, the full text of which is set forth in an appendix to this brief.

SUMMARY OF ARGUMENT

The question presented by this case is whether a rule requiring a defendant to prove the truth of his statement about a matter of public concern to avoid liability for defamation is consistent with the First Amendment and the Due Process Clause. Pennsylvania established such a rule in its early common law as the outgrowth of a presumption in favor of a libel plaintiff's good reputation, and the rule became codified in the Pennsylvania Judicial Code at 42 Pa. C.S. § 8343(b)(1). In the decision below, the Supreme Court of Pennsylvania held that the statute is valid, finding no conflict with the First Amendment. ____ Pa. ____, 485 A.2d 374 (1984).

The decision of the court below was in error. It permits the punishment of accurate news reporting, a result that is intolerable in our constitutional system. Burdens of proof are more than procedural tools; they are society's way of tipping the scales of justice in support of or opposition to a particular cause. By tipping the scales against free speech about public affairs, Pennsylvania has made a judgment at odds with the paramount importance that this nation has long and wisely accorded to

disseminating information about such matters. The practical effect of that judgment on news organizations is to discourage — under threat of substantial damages — the reporting of important information that reasonably is believed to be accurate unless the news organization is prepared to undertake the burden of proving accuracy to a factfinder. That burden is significant, particularly in the world of broadcast journalism, which so often must deal with fast-breaking news events of exceptional importance.

Pennsylvania's requirement that the defendant in a libel case involving matters of public concern prove the truth of his statement violates the First Amendment. Truthful speech about such matters is and must be protected under the Amendment, and forcing the defendant to prove truth means that erroneous factfinding in close cases where the evidence appears equally balanced will result in punishment of protected expression. The Pennsylvania law also violates the Due Process Clause because due process requires the use of procedures in a case such as this one that will give the benefit of the doubt to protected speech, a protection Pennsylvania does not afford.

In addition, the allocation of the burden of proof in Pennsylvania violates the requirements under the First Amendment established in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Under *Gertz*, a private figure plaintiff in an action involving speech about a matter of public concern must prove that the defendant acted without reasonable care in assessing falsity. The Pennsylvania rule absolves a plaintiff of part of that burden by allowing falsity, an essential element of fault, to be established by a mandatory rebuttable presumption.

ARGUMENT

I. REQUIRING A DEFENDANT TO PROVE THE TRUTH OF A STATEMENT ABOUT A MATTER OF PUBLIC CONCERN VIOLATES THE FIRST AMENDMENT AND THE DUE PROCESS CLAUSE BECAUSE THE REQUIREMENT PERMITS PUNISHMENT AND DETERRENCE OF SPEECH CONTAINING TRUE STATEMENTS OF PUBLIC IMPORTANCE.

In *Garrison v. Louisiana*, 379 U.S. 64 (1964), this Court, without dissent, held that the First Amendment prohibits the punishment of true statements about public affairs. The case dealt with a prosecution for criminal libel, but the Court made clear that its holding applied to civil defamation as well. The holding was unequivocal: "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." 379 U.S. at 74.

In the twenty years since *Garrison*, this Court has struggled to define the appropriate balance between First Amendment interests and the protection of reputation that is the objective of defamation law. Although the members of this Court have disagreed about where to mark that balance, there has been no disagreement about the need to protect the dissemination of truth about public affairs. Most of the Court's efforts have been directed to measuring the extent of "strategic protection" that must be afforded to *false* defamatory speech "to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974), quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963); *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964). This case does not deal with the prophylactic protection of false speech. Instead, in its most fundamental element, it deals with a rule permitting substantial damages for the utterance of

speech that is true. It thus runs afoul of the basic principles that all members of this Court have found to be common ground.

Pennsylvania has decreed that defamatory speech is presumed to be false unless the defendant can prove to a finder of fact by a preponderance of the evidence that the statement is not false. Under this rule, a jury that has doubts about the proper outcome of a case is directed to give the benefit of those doubts to the plaintiff and to conclude that the speech at issue is false and outside the realm of constitutional protection. The First Amendment and the Due Process Clause of the Fourteenth Amendment do not tolerate the burden that this rule places on the free speech interests recognized in *Garrison*. Because of the rule, speech that is true can be subject to monetary sanctions because of failure of the defendant to present evidence that, in the jury's mind, tips the scales of proof in its favor. The Pennsylvania scheme thus violates the First Amendment because it permits punishment for true statements about public affairs. It violates the Due Process Clause because it does not provide an adequate procedural safeguard in the way that it separates speech which is constitutionally protected from that which is not.

The First Amendment and due process questions in a case such as this one are intertwined and best dealt with together. See, e.g., *Speiser v. Randall*, 357 U.S. 513 (1958). They require an assessment of the competing demands for free expression and vindication of harm to reputation. Two of this Court's decisions already provide significant guidance on how those demands should be accommodated, and they are an appropriate starting point for analysis.

A. Under *Garrison v. Louisiana*, the First Amendment Prevents Punishment of True Speech.

As noted, *Garrison* held that true speech may not be the subject of sanctions for defamation, even though the true defamatory speech was made with ill will. The decision was based largely on this Court's decision in *New York Times Co. v. Sullivan*, *supra*, 376 U.S. 254, which, according to the Court in *Garrison*, held that the Constitution "absolutely prohibits punishment of truthful criticism." 379 U.S. at 78. Reviewing the balance struck in that case, the Court observed that, "where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth." *Id.* at 72-73 (footnote omitted). Thus, *New York Times* held "that a public official might be allowed the civil remedy only if he establishes that the utterance was false. . . ." *Id.* at 74. Accord, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 490 (1975); *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U.S. 6, 8, 10 (1970); *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966).

Garrison thus established that the constitutional protection of truth can require that a plaintiff bear the burden of proving a statement's falsity before he may recover. The decision was limited to speech related to public affairs (379 U.S. at 72 n.8) — what since has become known as "matters of public concern" — but that limitation has no bearing on this case. The newspaper articles at issue here concerned organized crime and the use of connections with criminal elements identified in state investigative documents to obtain favors and to avoid legal impediments. The articles discussed violations of Pennsylvania liquor laws and the use of influence by a state senator to aid the plaintiffs in their activities. These surely are matters "of political, social or other concern to the community" sufficient to satisfy even the narrowest

definition of "matters of public concern." See *Connick v. Myers*, 461 U.S. 138, 146 (1983); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. —, 53 U.S.L.W. 4866 (1985) (plurality opinion); cf. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). *Garrison* therefore should afford them protection.

Of course, *Garrison* dealt with actions brought by the Government or by public officials, but the Court's reasoning should apply with equal force to actions by private-figure plaintiffs — at least when matters of public concern are involved. The public interest in receiving truthful information about such matters is not less merely because the person suing is not a public official or public figure. As discussed in Part I.C. below, an analysis of the competing interests in a case such as this one confirms that fact. Under the reasoning of *Garrison*, therefore, the burden of proof applied in Pennsylvania is invalid under the First Amendment because it punishes the utterance of true statements about public affairs.

B. Under *Speiser v. Randall*, Due Process Requires That the Person Seeking To Punish Speech Prove That the Speech Is Not Protected Under the First Amendment.

The due process protection afforded to protected speech was addressed by this Court in *Speiser v. Randall*, 357 U.S. 513 (1958). That case dealt with a California statute that required a person claiming an exemption from property taxes to declare on his tax return that he did not advocate the unlawful overthrow of the government. The statute placed upon the taxpayer the burden of proving that he did not engage in the unlawful speech set forth in the statute and stated that, if the taxpayer did not meet that burden, he could not claim a tax exemption. This Court held that the California statutory scheme was unconstitutional.

In reaching this conclusion, the Court observed that the states' broad discretion to formulate rules allocating burdens of production and persuasion is circumscribed when the burden allocation is used to determine whether speech is constitutionally protected. The Court explained:

"[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. The separation of legitimate from illegitimate speech calls for more sensitive tools than California has supplied. In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome. There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value . . . this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance and of persuading the fact-finder at the conclusion of the trial Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellant engaged in criminal speech."

357 U.S. at 525-26 (citations omitted).

So long as the burden of proof remained with the taxpayer, there was a danger that legitimate speech that fell close to the line separating it from unlawful speech would be penalized because of an error in factfinding. *Id.* at 526. Because this result was intolerable under the First Amendment and principles of due process, the Court held the statutory scheme invalid.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court invalidated a Maryland statute that prescribed a scheme for prior approval of motion pictures by a board of censors before they could be exhibited. Examining the statute, the Court held that it failed to afford sufficient procedural safeguards to obviate the First Amendment dangers of a censorship system. Among the reasons for the invalidation was that it placed on the exhibitor the burden of proving that a particular motion picture was constitutionally protected expression. Quoting *Speiser, supra*, the Court held that the burden of proving that the film was not protected expression had to be placed on the person seeking such a declaration. 380 U.S. at 58-60. *Accord, Blount v. Rizzi*, 400 U.S. 410, 417 (1971) (mail statute regarding obscene materials).

Speiser and the cases following it make clear that when a state wishes to impose or authorize a sanction for the utterance of speech, such as defamation, that is not protected by the First Amendment, it must place on the person seeking the sanction the burden of proving that the speech is not within the protected realm of expression. The Pennsylvania statute sustained by the court below fails to comply with that fundamental rule. The state's allocation of the burden of proving truth therefore violates the First Amendment and the Due Process Clause. Although this Court has not yet had the occasion to apply the *Speiser* doctrine to defamation law, there is nothing about the distinction between true and false defamatory speech that should require an application of the doctrine different from distinguishing speech that does or does not pose a violent threat to the Government or speech that is or is not obscene. The analysis of competing interests in the next segment of this brief confirms this conclusion.

C. The Prohibition Against Punishment of True Speech and the Requirement That the Person Seeking To Punish Speech Prove Its Lack of Constitutional Protection Both Apply to Defamation Actions by Private Figures Involving Matters of Public Concern.

Garrison establishes that the line separating defamatory speech that is constitutionally protected from that which is not is defined by the statement's truth. *Speiser* teaches that the burden of proving that speech transcends that line must fall on the party seeking damages to punish it. The conclusion that the Pennsylvania statute is invalid should follow from these two cases *a fortiori*. These cases were the results of a careful balancing of the interests that are at stake in this area of the law, and, while subsequent decisions of this Court have fine-tuned that balance for defamation cases as circumstances varied, the later decisions continue to point to the constitutional infirmity of the Pennsylvania burden of proof statute.

Those recent decisions have established different tiers of protection for three types of cases. The highest tier is reserved for cases involving alleged defamation of public officials or public figures, in which the First Amendment interest is especially strong and, due to the public figures' assumption of the risk of publicity and greater recourse to self-help remedies, the state interest in protecting them from the hazards of free speech is not very great. A second level of protection applies to those who are not public officials or public figures when the matters stated about them are of general concern to the public. Because of the public interest in the subject matter, the need for First Amendment protection remains at a high level but the increased need for protection of private-figure plaintiffs raises a counter-balancing state interest. The third tier is reserved for plaintiffs who are neither public officials nor public figures and speech that

does not relate to matters of public concern. Here, the First Amendment interest in such speech is lower than for the first two categories, while the state's interest in protecting the private figures' reputation remains high. See *Dun & Bradstreet*, *supra*, 53 U.S.L.W. 4866; *Gertz*, *supra*, 418 U.S. 323; *New York Times*, *supra*, 376 U.S. 254.

This case falls within the second category of cases in the three-part structure. The trial court determined that the plaintiffs were not public figures, and defendants have not challenged that determination. The newspaper articles in question clearly dealt with a matter of public concern. The First Amendment balance in this case therefore must be struck in accordance with those decisions that have defined the level of protection for allegedly defamatory speech involving private figures and matters of public concern. See *Gertz*, *supra*. Because this case involves a procedural statute, the decision also requires consideration of the effect of the procedure at issue on the First Amendment interest at stake. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The First Amendment interest to be weighed in this balance, the freedom to speak and publish truthful material about public affairs, is very high. A basic objective of First Amendment protection is to assure unrestricted exchange of ideas for bringing about political and social change. *New York Times*, *supra*, 376 U.S. at 269; *Roth v. United States*, 354 U.S. 476, 484 (1957). Discussion of public affairs therefore "is at the heart of the First Amendment's protection." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), quoting *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940). As this Court stated in *Garrison*, *supra*, "speech concerning public affairs is more than self-expression; it is the essence of self-government." 379 U.S. at 74-75. Such speech "occupies the 'highest rung of the hierarchy of First Amendment values,'" and is entitled to special

protection." *Connick*, *supra*, 461 U.S. at 145, quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980). See *Dun & Bradstreet*, *supra*, 53 U.S.L.W. at 4868-69 (plurality opinion).

The effect of the burden of proof statute on this First Amendment interest is the same as that analyzed in *Speiser*, *supra*, 357 U.S. 513. By creating a mandatory rebuttable presumption of falsity, it requires that close cases be decided against protected speech, posing a substantial risk that true speech will be punished erroneously. Cf. *Francis v. Franklin*, 471 U.S. _____, 105 S. Ct. 1965 (1985); *County Court of Ulster County v. Allen*, 442 U.S. 140, 157-60 (1979). In addition, the Court in *Speiser* observed that this risk of mistaken factfinding poses a further risk of free speech infringement because the possibility of error will be likely to inhibit other speech in an effort to avoid the danger of liability. "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." 357 U.S. at 526. There will be a tendency to say not what the speaker reasonably believes to be true, but only what he believes he can *prove* to be true. *New York Times*, *supra*, 376 U.S. at 279. See also *Rosenbloom*, *supra*, 403 U.S. at 50 (plurality opinion). The tendency may be reinforced by the knowledge that, of the 19 damage verdicts in defamation actions brought by private figures and reported from 1982 through 1984, five exceeded \$1,000,000 and eight exceeded \$100,000. See LDRC Study No. 5, Libel Def. Resource Center Bull. No. 11, Nov. 15, 1984, at 16. These risks of erroneous deprivation and deterrence of free expression could be eliminated if the burden of proof were shifted away from the speaker.

The heavy constitutional interest at stake and the burden that the Pennsylvania statute imposes on that interest require that the Pennsylvania statute be invalidated unless Pennsylvania can demonstrate an overriding state interest that justifies maintaining the current statutory scheme. This Court has identified two state interests that may be pertinent. The first is protection against intrusion into certain aspects of the plaintiff's privacy about his person. *Rosenbloom, supra*, 403 U.S. at 48 (plurality opinion). But this interest has no relevance here, since the case involves a matter of public concern that, by definition, is not private. *Id.* See also *Garrison, supra*, 379 U.S. at 73 n.9; *Cox Broadcasting, supra*, 420 U.S. 469.

The second interest, which is the more prominent concern in defamation law, is protection of the plaintiff's "desire to preserve his public good name and reputation." *Rosenbloom, supra*, 403 U.S. at 48 (plurality opinion). This Court has recognized that when the plaintiff is not a public figure or public official, the state's interest in affording this protection is "strong and legitimate." *Gertz, supra*, 418 U.S. at 348. Accord, *Dun & Bradstreet, supra*, 53 U.S.L.W. at 4868. Nonetheless, faced with the need to balance this "strong" state interest against the fundamental First Amendment interest in permitting speech on matters of public concern, this Court has held that the state interest must yield. As the Court stated in *Rosenblatt, supra*, 383 U.S. at 86, "when interests in public discussion are particularly strong . . . the Constitution limits the protections afforded by the law of defamation." Thus, when faced with a claim by a private figure plaintiff involving speech about public affairs, the Court has concluded "that the state's interest is not substantial relative to the First Amendment interest in public speech." *Dun & Bradstreet, supra*, 53 U.S.L.W. at 4869 n.7 (plurality opinion; emphasis deleted).

Significantly, *Gertz* held that, even in private-figure cases, there must be some protection for false defamatory speech about public affairs so that true speech about such topics will not be chilled. 418 U.S. at 340-50. Since the balance struck in *Gertz* requires protection for false speech about public affairs, it necessarily follows that the First Amendment provides complete protection of true defamatory speech in such circumstances. Even those members of this Court who have opined that *Gertz* afforded too much protection to false speech nevertheless have suggested that a plaintiff should be permitted to vindicate harm to his reputation only "upon proving falsity." See, e.g., *Dun & Bradstreet, supra*, 53 U.S.L.W. at 4872 & n.3 (White, J., concurring). Accordingly, because the Pennsylvania burden of proof statute permits the imposition of penalties for the utterance of true speech in close cases by an erroneous factfinder, it must be invalid under the First Amendment.

While the state interest in reputation in itself is not sufficient here to justify the Pennsylvania statute, the opinion of the court below also identified some procedural justifications for the rule. The addition of these interests still is insufficient to override the First Amendment, however.

First, the court below observed that the Pennsylvania rule developed as a historical extension of the principle that a person accused of wrongdoing is presumed innocent until proven guilty. The Pennsylvania decisions reasoned that a person defamed had been accused of guilt and that he therefore should be presumed to have a good character until proven otherwise. As part of the presumption of good character, the decisions presumed that the defamatory charge leveled at the plaintiff was false. 485 A.2d at 378. This historical explanation identifies no state interest in support of the rule other than

the state desire to protect reputation and to create a margin of error in favor of those claiming to have been defamed. As already demonstrated, the state's interest in protecting reputation is not in itself sufficient to permit the burden allocation that Pennsylvania has chosen.

A second reason identified by the court below was, oddly enough, that the rule serves to protect a libel *defendant* by safeguarding him from the prejudice that would result if the plaintiff were to produce evidence of his good character (including the falsity of the statement) at trial. "[S]uch evidence would . . . take advantage of the defendant who was unapprised of its nature or . . . raise a collateral issue not made by the pleadings in the case." 485 A.2d at 379 n.1. The court below does not appear to have seriously relied upon this justification, and the transparency of the argument is readily apparent. As the court acknowledged, character evidence is admissible in cases in which character and reputation are directly in issue. *Id.* And as the Pennsylvania treatise cited by the court acknowledges, that is precisely the case in an action for defamation. 1 G. Henry, *Pennsylvania Evidence* § 155 (1953). Character is an essential issue in determining whether a person was defamed, and, apart from liability, evidence of damage to character and reputation often will have to be presented to establish "actual harm" entitling a private plaintiff to compensatory damages. See *Gertz*, 418 U.S. at 348-50. Thus, a presumption of good character and falsity cannot be designed to protect an unsuspecting defendant from evidence he did not expect to encounter.

The main reason identified by the court below to justify placing the burden on the defendant was that a contrary rule would be unfair to the plaintiff because falsity would be too difficult for the plaintiff to prove. 485 A.2d at 378; see *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 450-51, 273 A.2d 899, 908-09 (1971). In fact, however, proving truth or falsity often may be difficult for *either*

party, and, while the decision of the court below implies that truth will more easily be established by the defendant, that is hardly axiomatic. As this Court observed in *New York Times*, *supra*, 376 U.S. at 279, "Even courts accepting [the defense of truth] as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars." In this connection, it should be noted that proof of truth can present special difficulties for television news organizations, which may be forced to establish the truth not just of scripts or articles that they created, but of ambiguous television pictures that may be subject to a defamatory interpretation. Proof by the broadcaster that it had reasonable grounds to believe that the defamatory interpretation of the video was true (a burden that the defendant does not bear under *Gertz*) would be far easier than proving that the defamatory interpretation of the video shown is, in fact, the true one.

The lower court's suggestion that it is more "fair" to place the burden on the defendant than on the plaintiff apparently was based on two propositions. First, the court suggested that the defendant possesses the greater knowledge about the subject matter of his accusation and therefore is in a better position to prove its veracity. The court buttressed this view by pointing out that Pennsylvania accords a statutory "shield law" privilege to press organizations under which they may refuse to disclose the sources of information in their news reports. 485 A.2d at 386-87.

This reasoning is fallacious. The statement giving rise to the action for defamation will be about the plaintiff himself, and, obviously, the plaintiff will know more about that subject than will the person making the statement. Thus, Wigmore has observed that placing the burden of proving truth in a defamation case on a defendant

is *inconsistent* with the general principle that the burden of proof should be placed on the party that has peculiar means of knowledge about the subject at issue. 9 J.H. Wigmore, *Evidence in Trials at Common Law* § 2486, at 291 (Chadbourn rev. 1981). A state shield law does not change that fact. Although the statute might protect from discovery some of the information in the defendant's possession, it cannot alter the fact that the plaintiff still has superior knowledge about his own affairs. This aspect of the lower court's "fairness" rationale thus is misconceived.

The other apparent basis for the "fairness" assessment deals with hypothetical facts different from those presented by this case. The newspaper articles at issue here, which take up 30 pages of the joint appendix, contained detailed factual information setting forth the allegedly defamatory charges of which plaintiffs complain. The court below, however, posited a different situation in which the alleged libel was broad and lacking in specificity, and it suggested that proving the falsity of such a charge would be unfair because the plaintiff would not know the particular events forming the basis for the generalized charge and would be forced to "prove a negative." 485 A.2d at 378. The perception that there is something inherently wrong in requiring proof of a negative allegation is belied, however, by the numerous instances in which the law, including the law of Pennsylvania, imposes such an obligation. See, e.g., 9 Wigmore, *supra*, § 2486, citing, e.g., *Carl v. Grand Union Co.*, 105 Pa. Super. 371, 161 A. 429 (1932). See also *McCormick on Evidence* § 337, at 949 (3d ed. 1984). In any event, any difficulties that may be posed by such a requirement relate merely to the production of evidence and are not of sufficient magnitude to justify an infringement upon speech about public affairs.

The professed concern that a plaintiff will not know what specific evidence to produce to rebut a general

defamatory accusation is divorced from the realities of modern litigation. Even in a state that grants news organizations the protection of a shield law, the allegedly defamed plaintiff will be able to engage in a variety of discovery to explore the nature of the charges and their specifics. At trial, the plaintiff can meet his burden of production by generally denying the accusation, thereby shifting to the defendant the burden to produce evidence, if he has any, that the statement is true. Shifting burdens of production are common in American law (see generally *McCormick, supra*, § 338), and such a system would satisfy the concerns raised by the court below. Of course, Pennsylvania is free to create what it believes is a better system to deal with production of evidence regarding general negative averments, but here it has employed a system that shifts the ultimate burden of persuasion on the question whether speech is constitutionally protected. "The separation of legitimate from illegitimate speech calls for more sensitive tools than [Pennsylvania] has supplied." *Speiser, supra*, 357 U.S. at 525.

Despite the emphasis by the court below on the purported unfairness of requiring a plaintiff to prove falsity, that court's decisions in related areas of the law disclose that such "unfairness" has not been an overwhelming concern. For example, Pennsylvania, like most states, recognizes a sister tort to defamation which provides redress for charges disparaging a person's property or goods. See, e.g., *Menefee v. Columbia Broadcasting System, Inc.*, 458 Pa. 46, 329 A.2d 216 (1974). Despite the action's similarity to defamation, Pennsylvania requires the plaintiff to prove the falsity of the disparaging statement to recover. See, e.g., *Menefee, supra*, 458 Pa. at 53, 329 A.2d at 220; *Young v. Geiske*, 209 Pa. 515, 58 A. 887 (1904). See also *Paul v. Halferty*, 63 Pa. 46, 3 Am. Rep. 518 (1870); *Hygienic Fleeced Underwear Co. v. Way*, 35 Pa. Super. 229 (1908). This rule is in accord with the

general common law outside of Pennsylvania. See Restatement (Second) of Torts § 651(1)(c) & Comment *b* (1977). Similarly, although the case law is sparse, it appears that Pennsylvania and other jurisdictions also require a plaintiff to prove falsity to recover for the invasion of privacy tort known as "false light." See, e.g., *Martin v. Municipal Publications*, 510 F. Supp. 255, 259 (E.D.Pa. 1981); *Uhl v. Columbia Broadcasting Systems, Inc.*, 476 F. Supp. 1134 (W.D. Pa. 1979); *Anderson v. Low Rent Housing Commission*, 304 N.W.2d 239 (Iowa), *cert. denied*, 454 U.S. 1086 (1981).

These cases find no "unfairness" in the plaintiff's need to prove falsity. The disparagement cases explain the different burdens for defamation and disparagement solely on the ground that there is a historical presumption in favor of a defamed person's good character, but no similar presumption in favor of his property. See *Young*, *supra*, 209 Pa. at 519, 58 A. at 888. Ironically, as a result of this difference, Pennsylvania would accord greater protection to speech affecting a person's property and economic interests than to that involving matters of public concern about individuals. The disparagement and privacy cases show that fairness can be afforded if the plaintiff is made to prove falsity and that the contrary rule for defamation stems merely from a historical inclination to tip the scales of justice against a challenge to a person's good name. Cf. *McCormick*, *supra*, § 337, at 950 (rule probably reflects policy of handicapping truth as a disfavored defense). That inclination cannot justify infringement of First Amendment rights.

In sum, Pennsylvania can advance no interest sufficient to permit imposition of a penalty for truthful speech about matters of public concern. The burden allocation sustained by the court below fails to accord such speech the measure of protection required by the First Amendment and infringes upon rights of expression in a

manner forbidden by the Due Process Clause. The requirement that a libel defendant prove truth in a case involving matters of public concern therefore should be declared invalid.

II. REQUIRING A DEFENDANT TO PROVE THE TRUTH OF A STATEMENT ABOUT A MATTER OF PUBLIC CONCERN VIOLATES THE FIRST AMENDMENT BECAUSE FALSITY IS AN ELEMENT OF THE FAULT THAT THE CONSTITUTION REQUIRES THE PLAINTIFF TO ESTABLISH.

The Pennsylvania burden of proof allocation also is invalid because it violates the rule of *Gertz*, *supra*, 418 U.S. at 347-48, which held that a plaintiff may not recover damages for the utterance of false defamatory speech about a matter of public concern unless he proves that the false statement was uttered with "fault" on the part of the defendant. That decision permitted the imposition of liability upon proof that the defendant was negligent in assessing the statement's truth before publication, and the opinion of the court below made clear that Pennsylvania would apply such a negligence standard to determine fault in cases brought by private figures. See 485 A.2d at 384. The lower court failed to recognize, however, that to prove negligence under *Gertz*, a plaintiff also must prove falsity.

The negligence that the plaintiff must establish under *Gertz* is lack of due care by the defendant in assessing the truth or falsity of his statement before he publishes it. As Justice Powell observed in *Cox Broadcasting*, *supra*, "It is fair to say that if the statements are true, the standard contemplated by *Gertz* cannot be satisfied." 420 U.S. at 499 (concurring opinion). See also *Time, Inc. v. Firestone*, 424 U.S. 448, 458 (1976) ("demonstration that an article was true would seem to preclude finding the publisher at fault"). Although the

Court has spoken frequently of the connection between the "defense of truth" (an inaccurate phrase since, as the court below noted, 485 A.2d at 379 n.2, falsity is an element of the tort) and the requirement of fault, it has not addressed that connection in terms of the burden of proof. Analysis of the fault requirement makes clear, however, that the two are so "inevitably linked" that their proof must go hand in hand. *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371, 375 (6th Cir. 1981), cert. dismissed, 454 U.S. 1130 (1982).

As the court in *Wilson* explained:

"It would ordinarily be impossible to determine whether the defendant exercised reasonable care and caution in checking on the truth or falsity of a statement without first determining whether the statement was false. The publisher's carelessness must have caused an error in accuracy, an error in failing to ascertain that the defamatory statement was false. . . . Fault then must be held to consist of two elements: carelessness and falsity."

642 F.2d at 375 (footnote omitted).

A jury cannot assess the defendant's fault unless it assesses the facts concerning his carelessness together with those concerning the statement's veracity. *Id.*; cf. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. _____, 104 S.Ct. 1949 (1984) (relationship between falsity and proof of "actual malice"). Contrary to the suggestion of the court below (485 A.2d at 385 n.13), proof of carelessness in fact gathering alone cannot be enough to satisfy *Gertz* because carelessness is not actionable under *Gertz* unless it leads to an untrue statement.

Pennsylvania permits the plaintiff to establish the falsity element of the fault requirement under *Gertz* by

relying solely on the mandatory presumption of falsity created by the burden of proof statute, but the defect in that system is clear. A state cannot permit satisfaction of an element of proof required by the Constitution by creating a mandatory presumption that it exists. "Such a presumption is inconsistent with the federal rule." *New York Times*, *supra*, 376 U.S. at 283-84; see *Wilson*, *supra*, 642 F.2d at 375-76. Because the Pennsylvania burden of proof allocation absolves a libel plaintiff from proving a constitutionally required element of recovery, the allocation may not be permitted to stand.

In rejecting the argument that falsity is an element of the fault that must be proven by a plaintiff under *Gertz*, the court below disclosed a misunderstanding of the *Gertz* decision. That misunderstanding stemmed from confusion about the complicated relationship between a fault requirement and the various elements of a cause of action for defamation.

There are many aspects of a libel case that may implicate the negligence or other fault of the defendant. For example, he may have been careless in communicating or "publishing" the defamatory message to a third person, careless in assessing whether the message was true or false, or careless in determining whether the message would tend to harm the reputation of the plaintiff. At common law, these different aspects of fault were subsumed within the general rule that the defendant could be held liable only if he acted with "malice" (a level of fault theoretically greater than negligence), and that malice was presumed from the defamatory statement; thus, in effect, there was no real fault requirement and recovery was based on strict liability. There were two exceptions. First, apart from "malice," the plaintiff was required to prove that the defendant had acted with negligence or other fault in communicating the defamatory statement to a third person. Second, if the defendant demonstrated that the statement was "privileged" or

"justified" by some overriding public purpose, the plaintiff could defeat that defense by, *inter alia*, demonstrating that the defendant was negligent in assessing the statement's veracity. See Restatement (Second) of Torts § 580B, Comment *b* (1977); Restatement of Torts § 601 (1938); W.L. Prosser, *Handbook of the Law of Torts*, § 113 at 771-76, § 115 at 795-96 (1971).

Pennsylvania law followed these rules. See, e.g., *Barr v. Moore*, 87 Pa. 385 (1878) (presumption of malice); *Clark v. North American Co.*, 203 Pa. 346, 354, 53 A. 237, 239-40 (1902) (adhering to presumption); 42 Pa. C.S. § 8344 (fault in publication to third persons); *Neeb v. Hope*, 111 Pa. 145, 2 A. 568 (1886) (permitting proof of negligence to negate defense of privilege); 42 Pa. C.S. § 8342 (same); *Mathis v. Philadelphia Newspapers, Inc.*, 455 F. Supp. 406, 410 (E.D. Pa. 1978) (summarizing law). However, the cases emphasized the need for fault under the exceptions. See, e.g., *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A.2d 302 (1939) (requiring fault with respect to publication to third persons and asserting that this requirement and cases relying on fault to negate privilege defense meant state was not imposing strict liability).

The court below surveyed this landscape and concluded that, wholly apart from *Gertz*, Pennsylvania law already required sufficient proof of fault to meet constitutional standards. In particular, it found that the required proof of negligence in communicating a statement to third persons placed the state's law within constitutionally permissible bounds. 485 A.2d at 384-86. Thus, the court emphasized, "Under the law of this Commonwealth there is no liability for civil libel unless plaintiff can at least establish that the *dissemination* occurred as a result of lack of due care" and that the Constitution is satisfied "as long as the recovery is dependent upon the plaintiff's ability to establish the defendant's

willful or negligent conduct in *publishing* the defamatory matter." *Id.* at 385-86 (emphasis added). Accordingly, the court concluded that fault with respect to publication or some element of defamation other than the assessment of truth is sufficient to satisfy the requirement of *Gertz*. Since the fault does not have to be related to veracity, the court rejected the argument that proof of fault and falsity must take place together. *Id.*

The lower court's analysis of the constitutional fault requirement misconceives *Gertz*. This Court made clear in that case that the fault with which the Court was concerned was that relating to assessment of truth. Twice it repeated that the purpose of the requirement is to eliminate the danger that the defendant could be held liable "even if it took every reasonable precaution to ensure the accuracy of its assertions." 418 U.S. at 346; see *id.* at 347 n.10. The Court thus sought "to identify a standard of care with respect to the truth of the published facts" that would prevent inhibition of true speech. *Cox Broadcasting, supra*, 420 U.S. at 499 n.3 (Powell, J., concurring). The lower court's suggestion that this standard could be met by requiring, for example, proof of negligent publication therefore was clear error. That requirement existed before *Gertz*, and *Gertz* determined that it was not sufficient to protect First Amendment rights. See Rest. 2d Torts *supra*, § 580B, Comment *d*; *Prosser and Keeton on the Law of Torts* § 113 (5th ed. 1984). Because the lower court failed to perceive the essential link between falsity and the fault required by *Gertz*, it erred in deciding that the burden of proving falsity need not be placed on the plaintiff in proving fault under the First Amendment.

In sum, a plaintiff cannot prove that a defendant acted carelessly in assessing the truth of a defamatory statement without proving that the statement in fact was untrue. The Constitution forbids the establishment of untruth by the fiction of a mandatory presumption. Be-

cause the Pennsylvania burden of truth statute has precisely that effect, its application to defamation cases involving matters of public concern is invalid.

CONCLUSION

The Pennsylvania burden of truth statute, 42 Pa. C.S. § 8343(b)(1), violates the First and Fourteenth Amendments to the Constitution of the United States. It permits punishment of the truthful reporting of news about public affairs and thereby creates a serious risk that such reporting will be inhibited. The Constitution cannot permit that result.

The court below reversed a judgment in favor of defendants solely because the trial court refused to follow the unconstitutional burden of proof allocation in the Pennsylvania statute. This Court should reverse the Supreme Court of Pennsylvania and direct that the judgment in favor of the defendant-appellants be reinstated.

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Appendix.

PENNSYLVANIA CONSOLIDATED STATUTES
TITLE 42, JUDICIARY AND JUDICIAL PROCEDURE
CHAPTER 83, PARTICULAR RIGHTS AND
IMMUNITIES

SUBCHAPTER D, DEFAMATION

§ 8341. Single publication limitation

(a) **Short title of section.**—This section shall be known and may be cited as the “Uniform Single Publication Act.”

(b) **General rule.**—No person shall have more than one cause of action for damages for libel or slander, or invasion of privacy, or any other tort founded upon any single publication, or exhibition, or utterance, such as any one edition of a newspaper, or book, or magazine, or any one presentation to an audience, or any one broadcast over radio or television, or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

(c) **Bar by judgment.**—A judgment in any jurisdiction for or against the plaintiff upon the substantive merits of any action for damages founded upon a single publication, or exhibition, or utterance, as described in subsection (b), shall bar any other action for damages by the same plaintiff against the same defendant founded upon the same publication, or exhibition, or utterance.

§ 8342. Justification a defense

In all civil actions for libel, the plea of justification shall be accepted as an adequate and complete defense, when it is pleaded, and proved to the satisfaction of the jury, under the direction of the court as in other cases, that the publication is substantially true and is proper for

public information or investigation, and has not been maliciously or negligently made.

§ 8343. Burden of proof

(a) **Burden of plaintiff.**—In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

- (1) The defamatory character of the communication.
- (2) Its publication by the defendant.
- (3) Its application to the plaintiff.
- (4) The understanding by the recipient of its defamatory meaning.
- (5) The understanding by the recipient of it as intended to be applied to the plaintiff.
- (6) Special harm resulting to the plaintiff from its publication.
- (7) Abuse of a conditionally privileged occasion.

(b) **Burden of defendant.**—In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

- (1) The truth of the defamatory communication.
- (2) The privileged character of the occasion on which it was published.
- (3) The character of the subject matter of defamatory comment as of public concern.

§ 8344. Malice or negligence necessary to support award of damages

In all civil actions for libel, no damages shall be recovered unless it is established to the satisfaction of the

jury, under the direction of the court as in other cases, that the publication has been maliciously or negligently made, but where malice or negligence appears such damages may be awarded as the jury shall deem proper.

§ 8345. No liability when without power of censorship

Liability shall be denied and no recovery shall be allowed against the owners, licensees and operators of any visual or sound radio and television station or network of stations or against the agents, servants or employees of such owner, licensee or operator, for the publication, utterance or broadcasting of any defamatory matter, where the publication, utterance or broadcasting thereof is not subject to their censorship or control by reason of any Federal statute or any regulation, ruling or order of the Federal Communications Commission.

AUG 19 1985

JOSEPH T. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

PHILADELPHIA NEWSPAPERS, INC., *et al.*,
Appellants,
v.
MAURICE S. HEPPS, *et al.*,
Appellees.

On Appeal from the Supreme Court of Pennsylvania

**BRIEF AMICUS CURIAE OF PRINT
AND BROADCAST MEDIA AND ORGANIZATIONS †
IN SUPPORT OF APPELLANTS**

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No. 84-1491

PHILADELPHIA NEWSPAPERS, INC., *et al.*,
v.
MAURICE S. HEPPS, *et al.*,

On Appeal from the Supreme Court of Pennsylvania

**BRIEF AMICUS CURIAE OF PRINT
AND BROADCAST MEDIA AND ORGANIZATIONS
IN SUPPORT OF APPELLANTS**

INTEREST OF AMICI

The *amici curiae* submitting this brief include a wide variety of entities representing all forms of the news media—print, radio, and television. They range in size from large broadcasting and print organizations, such as the American Broadcasting Company, the Associated Press, and Cable News Network, Inc., to a small weekly newspaper (*The Highlander*, published by Highland Publishing Company in Marble Falls, Texas) with a circulation of 9,561. The *amici* obviously have a direct interest in the outcome of this appeal, which will determine whether states can constitutionally place the burden of proving truth on a media defendant in a private person case involving public issues.

As we demonstrate in this brief, the problems faced by the media in this type of litigation are not only legal in nature but extremely practical—problems which *amici* must face every day in the newsroom and in the courtroom. Because the Appellants and the other *amici* have concentrated primarily on the legal issues involved, this brief focuses on those practical and pragmatic considerations which might not otherwise come to the Court's attention. And since the public is not represented in this appeal, *amici* further demonstrate that the ultimate ramifications of the concerns expressed here will be that the uninhibited flow of information to the public will be threatened—an interest at the core of the First Amendment.

The parties have consented to the filing of this Brief.

STATEMENT OF THE CASE

We adopt the Statement of the Case set forth by Appellants in their Brief, as supplemented by certain facts added in the Argument below.

SUMMARY OF ARGUMENT

In addition to the legal principles set forth by Appellants and the other *amici* that argue persuasively for placing the burden of proof as to falsity on the plaintiff in a media case involving public issues, there are strong practical considerations calling for the same result.

The limited protections envisaged by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), have proven illusory. Most states have adopted negligence standards for determining fault, and the ground rules for establishing negligence are so loose that juries can and do assume that fault flows from falsity. Under the rule adopted below—that the burden of proving truth is on the defendant—there is, in fact, a presumption of falsity. This is because: jurors are usually instructed, as they were in this case, (a) that they can find fault only after finding falsity; and (b) that they can consider a wide-rang-

ing number of elements in determining fault. Thus, in practice, jurors are allowed to apply a rule of strict liability once they may presume that a defamatory publication is false. The situation is particularly egregious because defamation is defined in extremely broad terms in most states. Therefore, any media reporting “bad news” is susceptible to the enormous expense of time and resources in defending a defamation action, with the added threat of not being able to prove to a jury's satisfaction that its statements were true.

Under the rule below, it will be no simple matter for a media defendant to establish “truth,” because many states in private person cases (as opposed to public official/figure cases) have imposed on the defendant the burden of proving all adverse implications, inferences and innuendos arising out of the reporting of true facts. In this case, for example, the trial court told the jury five times that the statements published by defendants, even if literally true, could be held defamatory if they conveyed a false and defamatory meaning by implication and innuendo. This poses enormous problems for the press, and especially for small media that do not have the benefit of oversight counsel, in determining not only what some people may take a publication to mean, but how the truth of all of these inferences can be proven in court. The myriad questions of law that are involved in *proof*—particularly proof of inferences—will force many media to forego the publication of important, newsworthy stories.

Juries are already confused by libel instructions, and the application of the rule below will add a new element of confusion. Inevitably, the facts as to falsity will bear on the facts as to fault, and to tell a jury that one party has the burden as to falsity but that the other bears it as to fault is to create an unrealistic expectation of what a jury can absorb and apply. Moreover, in a close case the placement of the burden of proof may be determina-

tive, for by allocating that burden the trial court effectively decides each issue of fact which the jury is unable to decide. Thus, as a practical matter the result in certain cases is to impose liability without fault.

There is bound to be a resulting "chilling effect" on the press if the burden of proof as to truth is on the defendant. This self-censorship will be undertaken by both large and small media, although in some instances for different reasons. Even where a publisher is confident of the truth of the story, the risk of not being able to carry the burden of proving truth, combined with the already enormous costs of litigation, will often dissuade the media from publication. When this occurs—and it will if the lower court's ruling is affirmed—the ultimate loser will be the public.

ARGUMENT

Appellants and other *amici curiae* deal in some detail with the case law applicable to this lawsuit, from *New York Times v. Sullivan* 376 U.S. 254 (1964), through *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and its progeny. They correctly argue that imposing the burden of proving truth on the media defendant in a private person case involving public issues violates both the First Amendment and due process of law. They set forth the legal principles from a great variety of cases, with special emphasis on *Garrison v. Louisiana*, 379 U.S. 64 (1964), and *Speiser v. Randall*, 357 U.S. 513 (1958). They further point out that falsity is an essential element of a defamation action and that there are strong reasons for not assuming that defamatory speech is false. Finally, they assert that it is not unfair to place the burden of proving falsity on the plaintiff, that there are many analogous situations in the law where plaintiffs in fact carry that burden, and that the effect of the contrary ruling below penalizes fully protected truthful speech.

What has not been stressed, however, are some of the important practical aspects of how the Pennsylvania rule (i.e., placing the burden of proving truth on the defendant), if approved by this Court, will actually work in the state and federal courts. When these pragmatic considerations are taken into account,¹ it becomes even more apparent that the operation of the rule will result in an undue and unfair burden on the press, as well as a self-censorship that is incompatible with the free and uninhibited flow of information to the public. Such results are contrary to the purpose and protections of the First Amendment and should not be approved by this Court.

1. *The Negligence Standard Offers Little Protection.*

Gertz, insofar as relevant here, established two basic rules affecting private person cases in which public issues are discussed by the media: (1) the states are not bound by the actual malice standard, but instead are free to adopt lesser standards of liability; however, (2) the states may not impose liability without fault. Through these two rulings, the Court recognized that in order to preserve a free flow of information to the public, the media must be afforded some degree of liability protection, though not necessarily the degree accorded under the higher *Sullivan* standard. The Court apparently assumed that by requiring at least *negligence* to be shown and by allowing liability to be imposed only for false speech, the press and the First Amendment would receive all the protection needed.

¹ In a variety of situations, the Court has taken practical considerations into account in reaching its judgments. *E.g.*, *Wilson v. Garcia*, 53 U.S.L.W. 4481, 4484 (U.S. April 17, 1985); *Bennett v. New Jersey*, 53 U.S.L.W. 4337, 4339 (U.S. March 19, 1985); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 865 (1982); *Addington v. Texas*, 441 U.S. 418, 427-431 (1979); *Brinegar v. United States*, 338 U.S. 160, 175 (1949); *Carroll v. United States*, 267 U.S. 132, 153 (1925).

In actual practice, however, the limited *Gertz* protections have proven to be illusory, and if the additional burden of establishing truthfulness is now to be imposed on the media defendant, the goals sought by the Court in *Gertz* will be defeated altogether.

In the eleven years since *Gertz*, at least three-fifths of the states have responded by adopting some degree of negligence as the proper standard for fault, most of the remaining states have not definitively ruled on the matter, and only four have required that actual malice be shown.² Not surprisingly, due to the lesser protections afforded them, *Gertz* defendants have fared more poorly than *Sullivan* defendants at the hands of juries and judges.³ What is more disturbing, however, is that negligence standards adopted pursuant to *Gertz* have proven to provide little protection at all to media defendants, for in practice jurors can and do impose liability on the media where no negligence exists.⁴ The reason for this, as we demonstrate below, is that the ground rules for determining negligence are so loose that jurors often assume that negligence necessarily flows from a

² See *Miami Herald Pub. Co. v. Ane*, 423 So.2d 376, 385-386 n. 3 (Fla. Dist. Ct. App. 1982), *aff'd*, 458 So.2d 239 (Fla. 1984), and cases there cited; *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 726 n. 3 (Va. 1985), *cert. denied*, 105 S.Ct. 3513 & 3528 (1985), and cases there cited; Franklin, *What Does "Negligence" Mean in Defamation Cases?*, 6 Comm/Ent L. J. 259, 264-265 (1984); Collins & Drushal, *The Reaction of the State Courts to Gertz v. Robert Welch, Inc.*, 28 Case W. Res. L. Rev. 306 (1978).

³ Several studies have demonstrated this to be so. Franklin, *Suing the Media for Libel: A Litigation Study*, 1981 Am. B. Found. Research J. 795, 824-825; Libel Defense Resource Center ("LDRC") Bulletin No. 6, 41-43 (1983); LDRC Bulletin No. 11, 20-21 (1984); LDRC Bulletin No. 12, 7 (1984); Franklin, *supra* note 2, at 272-281. "This failure [of the negligence standard established in *Gertz*] is so clear and so serious that it alone should justify renewing the search for acceptable standards in libel cases." *Id.* at 281.

⁴ See generally L. Tribe, *American Constitutional Law* 646 (1978); Franklin, *supra* note 2, at 272-273.

finding that the defendant has published a false defamation, and, of course, under the Pennsylvania rule, falsity is presumed.

Normally, instructions to the jury *begin* with the issue of truth or falsity, because if the statement is true, a verdict must be returned for the defendant.⁵ Hence, in practice, jurors never reach the question of negligence unless they have determined a communication to be false. Moreover, negligence, and therefore fault, are defined to the jury in terms of falsity. An example is this very case, where the trial court did not instruct on the issue of fault until it had first instructed on the issue of falsity, and where the jurors were told not to decide fault until they had decided falsity. Thus, the court's instruction was that if the contested statements were found to be true, the defendant was not liable (JA A99), but if the statements were found to be false, "you will then consider the seventh element of the action in libel—the element of fault on the part of the defendants." JA A100. On that "element of fault," the jurors were allowed to consider a wide-ranging number of elements, including "whether a reasonably prudent person would have acted as the defendants did in investigating and publishing the articles, given the circumstances of this case." JA A104-A105. They were further told that "[t]he thoroughness of the check that a reasonable person would make before he published the article may vary with the play and interplay of these factors." JA A105.

In other words, the jury was free to determine the negligence issue based on very little more than a finding of falsity. Under instructions like these, it is all too easy for a jury to conclude that falsity necessarily denotes negligence—or, stated conversely, that absent negligence,

⁵ See, e.g., *Martin v. Griffin Television, Inc.*, 549 P.2d 85, 94 (Okla. 1976).

there could have been no false publication. Under such circumstances, a jury will likely reason that regardless of what was done, the error would have been caught and corrected if something *more* had been done. And the fact that something more *should* have been done follows naturally from the fact that something false was published. This line of reasoning in practice amounts to a rule of strict liability once the jury is allowed to presume that a defamatory publication was false.

This predisposition toward fault-finding would not be so serious if appellate courts were capable of ferreting out instances of over-zealousness in regard to negligence and were prepared to reverse on that ground. However, one study of such appellate reviews disclosed but a single reported case in which a finding of negligence was even a factor in reversal and found not one case tried under a negligence standard in which a verdict or judgment for the plaintiff was reversed solely because the finding of negligence was erroneous.⁶ The same was found true in a study of cases involving defense motions for summary judgment—negligence is such a loose standard that virtually no motions are won on this issue.⁷

If the negligence standard as interpreted by the lower courts in substance adds essentially nothing to the case, and a finding of negligence is virtually unreviewable, a state has, as a practical matter, imposed a standard of strict liability. A defamatory statement that is presumed to be false thus subjects the defendant to liability without any further proof. However, where the burden is on the plaintiff to prove falsity, there is at least a requirement of something more than a defamation and the filing of a complaint before a recovery is allowed against a media defendant that is unable, for whatever

⁶ LDRC Bulletin No. 6 at 42-43.

⁷ LDRC Bulletin No. 12 at 7.

reason,⁸ to prove truth. Shifting the burden on the issue of truth to the defendant not only exacerbates the practical imposition of strict liability but eliminates all constraints against groundless suits.

It is a common misconception that all libel plaintiffs sue for compensation for harm incurred or to clear their names. In fact, many sue for revenge, to harass, to intimidate, to obviate future unfavorable stories, or to recover a "windfall."⁹ It has been estimated that as many as half of all defamation suits are "nuisance" suits, with no hope of recovery.¹⁰ In the light of these facts, there is something fundamentally unfair about a general presumption that the defendant has acted wrongfully by speaking falsely merely on the basis of the filing of a complaint; "it runs counter to our usual assumption that a defendant has acted properly unless and until it is proven otherwise."¹¹ It is all too easy to file a complaint if it carries few burdens with it, and it is all too difficult to defend against such a complaint where the most important and difficult burden in the case is on the defendant.

Moreover, not even the requirement that the publication be defamatory offers much protection. This is because there are very few news reports that do not ad-

⁸ For example, evidence necessary to prove truth may be solely in the hands of, or under the effective control of, the plaintiff. See also note 30, *infra*, and accompanying text.

⁹ See Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. Rev. 1, 5 (1983); Massing, *The libel chill: How cold is it out there?*, Colum. Journalism Rev., May/June 1985, at 31, 33 (1985); Anderson, *Libel and Press Self-Censorship*, 53 Tex. L. Rev. 422, 435 (1975); *Herbert v. Lando*, 441 U.S. 153, 204-205 (1979) (Marshall, J., dissenting).

¹⁰ See Riley, *Fighting Back: What Redress Media Have Against Frivolous Libel Suits*, 59 Journalism Q. 566 (1982), as updated by Franklin, *supra* note 9, at 6 n. 27.

¹¹ R. Sack, *Libel, Slander, and Related Problems* 136 (1980).

versely impact upon someone, and the definitions of defamation in most states are so loosely worded that almost any adverse statements qualify as defamation. For example, in Pennsylvania, a statement is defamatory "if it tends so to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him'." *Vitteck v. Washington Broadcasting Co.*, 256 Pa. Super. 427, 389 A.2d 1197, 1200 (1978), quoting *Birl v. Philadelphia Electric Co.*, 402 Pa. 297, 167 A.2d 472, 475 (1960). Similarly, in Illinois a statement is defamatory if it "impeaches a person's integrity, virtue, human decency, respect for others or reputation and thereby lowers that person in the estimation of the community or deters third parties from dealing with that person." *Newell v. Field Enterprises*, 91 Ill. App.3d 735, 415 N.E.2d 434, 440, 47 Ill. Dec. 429 (1980), modified on other grounds, *Chapski v. Copley Press*, 92 Ill.2d 344, 442 N.E.2d 195, 65 Ill. Dec. 884 (1982). Under such standards media defendants subject to the Pennsylvania rule may be deprived of First Amendment protections altogether. Indeed, unless the Pennsylvania rule is repudiated, the practical result under many states' relaxed negligence and defamation standards may be jury verdicts against media defendants who simply report bad news.

2. The Problems of Foreseeability and Proof of Innuendo.

Much has been written in this case about the ability of one side or the other to prove truth, or the fairness of placing on one side or the other the burden of proving or disproving truth. But "truth" in a defamation case concerns more than the simple offering of clear and convincing evidence as to particular facts. Rather, whoever carries the burden of proof must also address all inferences that might reasonably be drawn from those facts—a formidable task not only in respect to evidence but, more importantly, in respect to foreseeing in advance of publication the possible inferences that later might also have to be supported by proof.

Many state courts have drawn a sharp distinction in this regard between public official/figure and private person cases. Where the plaintiffs are public official/figures, there can be no liability for inference or innuendo once the published facts have been proven true. See, e.g., *Strada v. Connecticut Newspapers, Inc.*, 193 Conn. 313, 477 A.2d 1005, 1010-12 (1984), and cases there cited. As the *Strada* court held, "[t]he media would be unduly burdened if, in addition to reporting facts about public officers and public affairs correctly, it had to be vigilant for any possibly defamatory *implication* arising from the report of those true facts." *Id.* at 1012; emphasis added.

And yet precisely the opposite is true in private person cases; defendants can be and have been held liable for implications, inferences and innuendos arising out of the reporting of true facts. In Pennsylvania, for example, a finding of falsity may be based on a false inference drawn from true statements.¹² In a recent Pennsylvania case, the defendant newspaper had to prove not only the truth of statements in an article about a son committing suicide (such as the fact that he shot himself with a rifle belonging to his father) but also the truth of the *implication* that the father in some fashion caused the suicide. *Rutt v. Bethlehems' Globe Pub. Co.*, 484 A.2d 72, 76-77 (Pa. Super. 1984).¹³ In this very

¹² E.g., *Bogash v. Elkins*, 405 Pa. 437, 176 A.2d 677 (1962); *Sarkees v. Warner-West Corp.*, 349 Pa. 365, 369, 37 A.2d 544, 546 (1944).

¹³ In Pennsylvania, for purposes of the threshold determination of whether a communication could have been understood as defamatory, it is not necessary that the communication actually caused harm; its defamatory character "depends on the general tendency of the words to have such an effect." *Agriss v. Roadway Express, Inc.*, 483 A.2d 456, 461 (Pa. Super. 1984). Moreover, the fact that the communication is subject to an innocuous interpretation or that the author had an innocent intention does not defeat the right of action. *Id.* at 462; *Brophy v. Philadelphia Newspapers, Inc.*, 281

case, the trial court told the jury not once but five times that the statements published by defendants, even if literally true, could be held defamatory if they conveyed a false and defamatory meaning by implication and innuendo.¹⁴ A defendant who has the burden to prove "truth" in such a setting not only has an unfair evidentiary burden but, more importantly, is saddled with such a weight on its stories—that is, the need to foresee how some reader may *misconstrue* true statements—that some of those stories may never be released to the public at all.

The same type of "sting" rule as to inferences obtains in other states. In a Tennessee case, for example, where

Pa. Super. 588, 422 A.2d 625 (1980); *Raffensberger v. Moran*, 485 A.2d 447, 451 (Pa. Super. 1984); *Zartman v. Lehigh County Humane Soc'y*, 482 A.2d 266, 269 (Pa. Super. 1984).

¹⁴ JA A99-A100:

Nevertheless, although individual statements in an article may be literally true, if the article conveys a defamatory meaning by implications and innuendo, which meaning is false, then insofar as the law is concerned, the article is false.

Once again: Although individual statements in an article may be literally true, if the article conveys a defamatory meaning by implication and innuendo, which meaning is false, then insofar as the law is concerned, the article is false.

The proof of falsity thus must be directed at the gist or sting of the defamation. The test is whether the alleged libel, as published, would have a different effect on the mind of the reader than the truth would have produced.

Remember again, if defamatory implications and innuendo produced by an article are false, the literal truth of each fact asserted in the article will not render the article true where the article read in its entirety implies additional defamatory statements.

In order to carry their burden with respect to the sixth element, then, the plaintiffs must prove by a fair preponderance of the evidence either that a defamatory statement in an article was false, or that while true, the statements in an article conveyed a defamatory meaning by implication and innuendo, which defamatory meaning was false.

the burden was on the defendant newspaper to prove truth, it was held not to be a defense that *every statement* in the article was true and correct. Since the ordinary reader could have inferred an additional, adverse *meaning* from the article, the newspaper had to prove the truth of that *meaning*. *Memphis Pub. Co. v. Nichols*, 569 S.W. 2d 412, 418-420 (Tenn. 1978). Throughout these rulings, the state courts have imposed a different, more all-encompassing type of duty upon the defendant in a private person case than in a public official/figure case.¹⁵ Thus, it will not be enough for a media defendant who bears the burden of proof simply to prove the truth of the relevant facts; it must also prove the truth of inferences, implications, and innuendos that can be drawn from those facts.

A *per se* defamatory publication is presumed to have been understood in a defamatory sense, but when a publication is susceptible to an innocent as well as a defamatory interpretation, the plaintiff is required in some states to prove the defamatory meaning because there is no basis for any presumption.¹⁶ Yet these assumptions

¹⁵ Compare, e.g., *Madison v. Bolton*, 234 La. 997, 102 So.2d 433, 438 (1958) (in a private person case, "if the words used, when taken in their ordinary acceptation, convey a degrading imputation, no matter how indirectly, they are libelous—it matters not how artfully their meaning is concealed or disguised"), with *Schaefer v. Lynch*, 406 So.2d 185, 188 (La. 1981) (*Bolton* ruling is correct but not applicable to public officials). The Washington Supreme Court, in holding against a broadcaster in a private person defamation case, has said that the plaintiff may recover upon a showing that "the defendant knew or, in the exercise of reasonable care, should have known that the statement was false, or would create a false impression in some material respects." *Taskett v. King Broadcasting Co.*, 86 Wash.2d 439, 546 P.2d 81, 85 (1976) (emphasis in original).

¹⁶ See Spiegel, *Defamation by Implication—In the Confidential Manner*, 29 S. Cal. L. Rev. 306, 312 (1956).

are stood on their head in states like Pennsylvania, where the plaintiff is not required to be put to any proof in this regard, and the defendant must establish the truth of each adverse interpretation that the jury could legitimately draw. Since "[i]t is often the case that although the basic facts are not in dispute, the parties in good faith may nevertheless disagree about the inferences to be drawn from these facts * * *,"¹⁷ the question of who bears the burden of proof in relation to inferences becomes vital.

Moreover, it must be remembered that while a plaintiff need only read or hear what has been published about him and allege the inferences that he believes others have drawn from the statement, the media defendant, if it carries the burden imposed by Pennsylvania, must *foresee* all adverse inferences that may ultimately be drawn from the statements and either eliminate them from the communication or prove them true. Thus, the California Supreme Court, in a case deciding that a defendant is liable for what is insinuated as well as for what is stated explicitly, went so far as to say that "[t]he language used may give rise to conflicting inferences as to the meaning intended, but when it is addressed to the public at large, it is reasonable to assume that at least some of the readers will take it in its defamatory sense."¹⁸ Such a rule may be fair and practical so long as the plaintiff is required to prove the

¹⁷ *S.J. Groves & Sons Co. v. Ohio Turnpike Comm'n*, 315 F.2d 235, 237 (6th Cir.), *cert. denied*, 375 U.S. 824 (1963).

¹⁸ *MacLeod v. Tribune Pub. Co.*, 52 Cal.2d 536, 343 P.2d 36, 43 (1959). See also *Herrmann v. Newark Morning Ledger Co.*, 48 N.J. Super. 420, 138 A.2d 61, 71-72, *aff'd on rehearing*, 49 N.J. Super. 551, 140 A.2d 529, 530 (1958), where the court stated that even though an article does not impute defamatory meaning on its face, and even though a majority of people would not derive a defamatory meaning from it, the defendant carries the burden of proving the truth of the defamatory implications that some people will derive from it.

falsity of the particular inference he drew, but if that burden is on the media defendant, the scope of the burden is almost limitlessness.¹⁹

Indeed, under that approach a defendant might publish a statement about the plaintiff which was not defamatory on its face but was defamatory only because of facts known to the plaintiff and his intimates. The question whether the defendant should have discovered those facts would be then left to a jury, along with the question whether the defendant had proved the truth of connotations of which it may not have been aware when it published the statement. To require that the defendant have the full burden of proof as to such "truth," particularly where the plaintiff's complaint may not be specific about the sense in which the statements were deemed to be defamatory, is both unfair and unrealistic. It places too heavy a burden on the media defendant under the First Amendment. As one commentator has put it: "It would be only too easy for a jury to conclude that *someone* at the newspaper should have known of the latent ambiguity or hidden fact. The only way to avoid such a result is to require the plaintiff to establish that the media defendant was aware of the defamatory meaning at the

¹⁹ Courts are already mired in the kinds of determinations involved in *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 11-14 (1970), where this Court had to decide whether the word "blackmail" could have been understood by a reader in the sense alleged by the plaintiff. This type of problem will be greatly exacerbated if the burden of proving the truth of all inferences is on the defendant, because the defendant not only will be forced to prove that the inferences alleged by the plaintiff could not be inferred by reasonable people but also that, if those unintended inferences could be drawn, they are, in fact, true. In an already confused atmosphere, the jury will thus be further misled by the alternative, contradictory positions forced upon the defendant. It makes much more sense to place the ultimate burden of persuasion on the plaintiff, thus leaving a defendant free to interpose truth as an affirmative defense.

time the statement was uttered.”²⁰ And this burden, of course, is inextricably intertwined with that of truth or falsity.

Under the Pennsylvania rule, there is still a further complication. In some states, ambiguous language must be pleaded by the plaintiff so as to indicate that the words were understood in a defamatory sense—that the position or opinion of the readers was such that they derived a defamatory meaning from them.²¹ Can this burden also be shifted to the media defendant, so that it must prove, in an ambiguous language case, that readers could not have understood the words as defamatory or derived a defamatory meaning from them? Such a burden would appear to be intolerable, and yet it flows naturally from the Pennsylvania rule in those states where the plaintiff can plead the defamation in general terms.

Although this Court announced in *Gertz* that it might take into account “somewhat different” considerations if a statement’s content “did not warn a reasonably prudent editor or broadcaster of its defamatory potential” (418 U.S. at 348), it is not at all clear how such considerations can be taken into account in practice. For example, there obviously would be serious difficulties in reversing a jury’s finding, approved by a state court following its own standards, that (a) a reasonably prudent editor or broadcaster *should* have foreseen all innuendos, and (b) the editor or broadcaster failed to carry its burden of proving the truth of those innuendos. In such a case, at the very least the Court would have to establish two categories of “fact”—direct facts, which the defendant carries the burden of proving, and facts

²⁰ Franklin & Bussel, *The Plaintiff’s Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L. Rev. 825, 844 (1984) (emphasis in original).

²¹ This is true, for example, in California. *E.g.*, *Peabody v. Barham*, 52 Cal. App.2d 581, 126 P.2d 668, 670 (1942), modified in *MacLeod v. Tribune Pub. Co.*, *supra*.

by inference, which the plaintiff carries the burden of disproving. Whether this dichotomy would be workable, in view of the maze of variations on the “fact” theme now extant in the states, is problematical at best.²²

If the Pennsylvania Supreme Court ruling stands, media defendants will bear the burden of proving the truth of any and every adverse implication, inference or innuendo that some people might derive from published statements. Not only is such a rule unfair and unworkable, but the spectre of the rule, with its attendant media burden of foreseeing myriad reader or listener interpretations of its statements and how they might be proved true, will chill many statements, to the ultimate detriment of the public.

3. *The Issues of Jury Confusion.*

Juries are already confused by instructions in libel cases,²³ and the application of the Pennsylvania ruling will add a new element of confusion that threatens a vigorous, outspoken press.

Appellants and other *amici* persuasively urge the express adoption of the legal concept, derived from *Time, Inc. v. Firestone*, 424 U.S. 448, 458 (1976), that falsity is an element of fault. We agree with their arguments in favor of such a doctrine but write separately because the difficulty of separating for a jury the elements of fault from the elements of falsity has great practical import.

²² Franklin & Bussel, *supra* note 20, at 828-834; *Greenbelt Coop. Pub. Ass’n v. Bresler*, 398 U.S. at 22, 23 (White, J., concurring).

²³ See, e.g., Brill, *Inside the Jury Room at the Washington Post Libel Trial*, Am. Law., Nov. 1982, at 1; Taylor, *Libel Law: A Tough Puzzle for Trial Jury*, N.Y. Times, May 5, 1983, at B15, col. 1; Franklin, *supra* note 9, at 8.

As we have noted, while it is theoretically true that a defendant can act reasonably or be "non-negligent" in publishing an untrue libelous statement, it is going to be extraordinarily difficult for a jury to believe it. First, in the minds of many jurors, reasonable care is closely associated with and often dependent upon a determination of truth or falsity. As one court has stated, "[t]he publisher's carelessness must have caused an error in accuracy, an error in failing to ascertain that the defamatory statement was false."²⁴ Fault, in other words, not only consists of carelessness but is evidenced by the resulting falsity. Second, a jury is going to be considering evidence as to fault and falsity at the same time, and inevitably the facts found as to one will bear on the other. To tell a jury that one party carries the burden as to truth but the other carries it as to fault is to create unrealistic expectations of what a jury can absorb and apply.²⁵ The risk is great under the Pennsylvania rule that if the defendant does not prove "truth," it will inevitably be found at fault.

We have seen how this works in the instant case. The instructions on fault followed immediately upon, and were related to, the instructions on falsity. The jurors were told to turn from their consideration of one to their consideration of the other. In exercising their practical, good-sense judgment about whether due care had been

²⁴ *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371, 375 (6th Cir.), cert. dismissed pursuant to Rule 53, 454 U.S. 1130 (1981).

²⁵ Keeton, *Defamation and Freedom of the Press*, 54 Tex. L. Rev. 1221, 1236 (1976); Franklin & Bussel, *supra* note 20, at 858. The fact that the burden of proving truth or falsity can make the difference is demonstrated by the *Washington Post-Tavoulareas* case, where it has been reported that one juror was able to convince the other five that the *Post* carried the burden of proving truth and had failed to do so. Brill, *supra* note 23. See generally *Tavoulareas v. Washington Post Co.*, 759 F.2d 90 (D.C. Cir. 1985), *reh'g granted*, June 11, 1985.

exercised, therefore, the jurors had uppermost in their minds the conclusions they had just reached about truth or falsity. In this case, the burden was placed by the trial judge on the plaintiff of proving falsity, but when the Pennsylvania rule as announced by the state's Supreme Court is followed in the next case (or in this case on remand), the burden of proving truth will be on the defendant. The jury, if it reaches the issue of fault at all, will have just decided against the defendant on the truth issue; it will have concluded that a defamatory falsehood has been published. Added to the jury's burden of trying to disassociate falsity from fault will be the almost impossible task of recognizing and applying a shift in the burden of proof from the defendant back to the plaintiff. This is more than a jury can reasonably be asked to do, and the resulting risk of unfair defamation judgments is greater than media defendants should be asked to bear.

Additional pragmatic considerations argue for placing the falsity burden on the plaintiff, particularly in those cases where the plaintiff seeks to establish the defendant's culpable state of mind. If the plaintiff is attempting to show that the defendant lacked a reasonable basis for believing the contested statement to be true, as a practical matter he has to prove that the statement is false. If falsity is to be a prerequisite to recovery—which it must be, under *Gertz* and *Firestone*—a great deal of confusion in submitting the case to the jury is going to be avoided by placing the burden of proof as to that issue on the plaintiff. And that plaintiff, after all, is in the best position to know the facts and details about his own activities.²⁶

Such considerations as these matter in the courtroom. While statistical proof concerning jury deliberations is not available, both plaintiffs' and defendants' trial at-

²⁶ See Keeton, *supra* note 25, at 1236; Franklin & Bussel, *supra* note 20, at 859.

torneys know from experience that many defamation cases are extremely close in the minds of jurors, and that a number of factors, including who carries the burden of proof, can be decisive in reaching a given result. In a close case, placement of the burden of proof may well be determinative of liability. Thus, by allocating the burden of proof, the trial court effectively "decides each issue of fact which the jury is unable to decide."²⁷ The practical result is to impose liability without fault in certain cases—a result which, as we have noted, this Court had said the states cannot constitutionally reach even in private person cases.

There are other important First Amendment considerations. For example, if the burden rests on the defendant to prove truth, the pressure increases dramatically to produce any confidential sources who can supply that proof. Yet as numerous state shield statutes attest,²⁸ there are strong public policy reasons for not forcing the production of confidential sources except where absolutely essential to the resolution of a lawsuit. Moreover, as one state court has pointed out, "no direct consideration appears to have been given [in the extensive litigation to date] to the scope of potential

²⁷ E. Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation* 70-71 (1956).

²⁸ At least half the states have some form of statutory shield protection for confidential sources. See Ala. Code § 12-21-142; Ariz. Rev. Stat. § 12-2237 (1981); Ark. Stat. Ann. § 43-917 (1977); Cal. Const. art. 1, § 2(b); Del. Code Ann. tit. 10, §§ 4320-4326; Ill. Rev. Stat. ch. 110, § 8-901 *et seq.*; Ind. Code § 34-3-5-1; Ky. Rev. Stat. § 421.100; La. Rev. Stat. § 45:1454; Md. Cts. & Jud. Proc. Code Ann. § 9-112; Mich. Comp. Law § 767.5a; Minn. Stat. §§ 595.021-595.025 (1981); Mont. Code Ann. §§ 26-1-901 *et seq.*; Neb. Rev. Stat. §§ 20-144-20-147 (1977); Nev. Rev. Stat. § 49.275; N.J. Rev. Stat. § 2A:84A-21; N.M. Stat. Ann. § 38-6-7 (1978); N.Y. Civ. Rights Law § 79-h; N.D. Cent. Code § 31-01-06.2; Ohio Rev. Code Ann. § 2739.12 (Page 1981); Okla. Stat. tit. 12, § 2506; Or. Rev. Stat. §§ 44.510-44.540; 42 Pa. Cons. Stat. Ann. § 5942; R.I. Gen. Laws § 9-19.1-2; Tenn. Code Ann. § 24-1-208.

liability for defamation to which an identified news source is exposed."²⁹ In other words, even in a case where truth can be proved, the media defendant risks not only revealing confidential sources but exposing them to the same defamation charges that the defendant is already experiencing.³⁰

We do not argue, based on the foregoing considerations, for a general application of the *Sullivan* principles to private parties. We do say, however, that in view of the unfairness and risk of self-censorship that will result from the Pennsylvania rule, each citizen may fairly be asked to spell out in his or her complaint precisely what the alleged defamation is and then proceed to prove that the defamatory elements are false. Otherwise, the balance between the protection of private rights and the free flow of information to the public will swing so strongly to one side that all citizens in the democracy will suffer. As one state court has so aptly pointed out, treating only public officials/figures as having assumed the risk of defamation by placing themselves in the public eye misconceives "the role which every citizen is expected to play in a system of participatory self-government. Every citizen, as a necessary part of living in society, must assume the risk of media comment when he becomes involved, whether voluntarily or involuntarily, in a matter of general or public interest."³¹

²⁹ *Dairy Stores, Inc. v. Sentinel Pub. Co.*, 191 N.J. Super. 202, 465 A.2d 953, 962 (1983), *aff'd*, 198 N.J. Super. 19, 486 A.2d 344 (1985).

³⁰ Moreover, a serious problem may exist as to whether the confidential source will support the information he previously supplied. As a witness, the source may change his story during discovery, or even lie, either because the repercussions from the information had not been anticipated or to avoid being subjected to liability. See Franklin, *supra* note 2, at 279.

³¹ *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580, 588 (1974), *cert. denied*, 424 U.S. 913 (1976).

4. *The Resulting Self-censorship by the Press.*

A claimed "chilling effect" on the press from libel litigation has become such a cliché that attorneys tend largely to avoid it—as witness the briefs by Appellants and the other *amici* in this case. But the fact is that even successfully-defended libel litigation has had a chilling effect on news reporting, though some in the industry—perhaps out of professional pride and personal self-esteem—deny it.³² A contributing editor of the *Columbia Journalism Review*, for example, interviewed more than 150 reporters, editors and media lawyers and "came away convinced that a chill has indeed set in." Massing, *supra* note 9, at 31. He has given numerous examples of how the chill has manifested itself, from the discontinuance of investigative journalism to names and pertinent details being left out of stories. *Id.* One managing editor told him, "[y]ou can never prove that a story didn't get into a paper, but I'm going to say that there are things that should have gotten into our paper that haven't." *Id.* The editor of a small weekly who had been sued seven times in ten years, who had successfully disposed of all of these suits but had gone "broke" in the process, and who had spent an average of one day a week on court-related matters, told the author, "I'm not as aggressive as I used to be." *Id.* at 34. Many other examples are given.³³

³² Smith, *The Rising Tide of Libel Litigation: Implications of the Gertz Negligence Rule*, 44 Mont. L. Rev. 71, 87 (1983); Friendly, *Investigative Journalism Is Found Shifting Goals*, N.Y. Times, Aug. 23, 1983, at 8, col. 1 ("reporters or television news directors do not openly discuss the chances they do not take").

³³ Of course, the now-familiar story of the *Alton (Ill.) Telegraph* (cir. 38,000) and its \$1.4 million settlement of a \$10.5 million libel suit need not be repeated here. Suffice it to say that today, the *Telegraph* "doesn't produce the kind of investigations that once led to the resignation of two Illinois Supreme Court judges for accepting gifts of stock." Curley, *How Libel Suit Sapped The Crusading Spirit Of A Small Newspaper*, Wall St. J., Sept. 29, 1983, at 1, col. 1.

This Court recognized in *Sullivan*, 376 U.S. at 279, that requiring the media to prove the truth of reported facts would lead to self-censorship. Publishers, the Court noted, would avoid the publication of controversial articles because they would be fearful of not being able to prove the truth of their statements. But precisely the same reasoning is applicable to stories about private persons. The fear does not relate to the nature of the person being written about but to the possibility of a lawsuit and the inability to prove in a court of law, by whatever legal standard is applicable, that each element of the story is true.

Both large media and small would be at a disadvantage if the added burden of proof under the Pennsylvania rule were imposed on them.

Large media, such as national television networks and newspapers in large cities, will normally have attorneys available to check questionable or borderline stories. Attorneys are notoriously conservative in close cases, finding it easier to say "no" than to risk even a winnable lawsuit.³⁴ Therefore, the decision may well be to change or even kill a story rather than risk the time and expense of a possible lawsuit, even if the press is confident of the truth of the story. This will be particularly so, however, if the press has to *prove* truthfulness, and even more particularly truthfulness as to all possible interpretations of the story.

If stories are printed and the resulting lawsuits reach trial, large media appear to juries to be corporate, deep-pocket defendants that elicit no sympathy or understanding. It would simply be ignoring reality not to recognize that today, more than in most periods of our history, there is an animosity toward the press. Whether this is because journalists are regarded as arrogant, the media

³⁴ See examples in Anderson, *supra* note 9, at 431-432.

appear to be biased, or for whatever reason, juries are reflecting a general community hostility to the press, and their verdicts are reflecting this attitude.³⁵ Whether or not such attitudes are justified, if rules of law allow them to be translated into unjustified jury verdicts, the public will be the eventual loser.

Small media, on the other hand, are most likely to become embroiled in private person litigation; it is the small town dailies or weeklies, for example, that report more often about private persons and that therefore run the greater risk by virtue of the sheer number of stories printed. Yet small media normally do not have attorneys immediately at hand to protect them by reviewing such stories prior to publication.

This fact has particularly serious consequences under the Pennsylvania rule. In a case where the burden of proving falsity is on the plaintiff, any editor who is confident of the truth of a story will probably release it, even if it involves a controversial subject. But if the burden is the other way, a wholly different set of considerations comes into play. The question then becomes not whether the story is true, but whether the press can *prove*, as a matter of law, that it is true. How will the hearsay rule apply, if at all? Will the evidence relied upon be deemed legally admissible? Can witnesses in

³⁵ See, e.g., Goodale, *The Tavoulaareas Jury Verdict Provides a Chilling Lesson for the Press*, 1 Com. Law 6 (No. 3, 1983); Franklin, *supra* note 9, at 8-10. The trend toward trial rather than summary judgment, larger jury awards, larger legal fees in libel cases, and larger costs of settlement, have all been well documented. See, e.g., Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. Pa. L. Rev. 1, 6-7, 13, 14 (1983). For a recent study of one jury's attitude toward a media defendant in a libel case, see LDRC Bulletin No. 14, 1, 6-7, 9-10 (1985).

In an entirely different context, this Court has decided a case in part because of "the propensity of juries to award excessive damages for defamation." *Linn v. United Plant Guard Workers*, 383 U.S. 53, 64 (1966).

support of the story be subpoenaed, particularly if they are located out of town? Can the testimony of old or unavailable witnesses be preserved? Suppose a witness is deceased? What are the rules as to confidential sources? These and a myriad of other questions will face the editor without the aid of an attorney. The practical result may well be to avoid the whole problem by killing the story.

Under the Pennsylvania rule, the time it takes to defend a libel action, the costs and diversion of resources for that defense, and the possibility of large jury awards would, along with all of the problems of affirmatively proving the truth of the defamatory statements, amount to a combination of publication disincentives that many media could not bear. The impact would be particularly burdensome on small media.

Large media obtaining copy from wire services and small media receiving copy from free-lancers will have special problems. Under Pennsylvania law—as in many other jurisdictions³⁶—it is no defense that a third party made the defamatory statement and that the defendant merely repeated or otherwise republished it. The defendant is subject to the same liability as if it had originally

³⁶ Restatement (Second) of Torts § 578 (1976). For example, unless a special privilege applies, if a defendant publishes the fact that X said that Y committed a crime, it is not enough for the defendant to prove that X made the statement; it must prove that Y *did* commit the crime. L. Eldredge, *Law of Defamation* § 67, at 331 (1978); see generally *Lawrence v. Bauer Pub. & Printing Ltd.*, 89 N.J. 451, 446 A.2d 469, 474, *cert. denied*, 459 U.S. 999 (1982); *Medico v. Time, Inc.*, 643 F.2d 134, 137-139 (3d Cir.) (discussing "fair report" exception), *cert. denied*, 454 U.S. 836 (1981).

For examples of how significant this can be when the standard is simple negligence, as opposed to actual malice, see LaRue, *Living With Gertz: A Practical Look at Constitutional Libel Standards*, 67 Va. L. Rev. 287 (1981).

published the defamation.³⁷ If the burden is on the newspaper to prove the truth of a story received from a news agency or a syndicate covering remote persons or events, for example, there may be serious impediments to the paper's ability to discover and prove truth, particularly where it alone is sued. That there may be ultimate vindication for the newspaper in no way diminishes the chilling effect that this cumbersome and costly procedure will have on the newspaper in the meantime.³⁸

We respectfully submit that it is precisely because the malice standard does *not* apply to private persons that the media need the protection accorded by having the burden of proving falsity on the plaintiff. The higher standards of fault that are required when the media defames a public person are no longer applicable; simple negligence will suffice, and, as we have seen, this is in any event an illusory standard of protection, particularly given the almost unlimited definition of defamation in most states.³⁹ If the media, protected only by the simple

³⁷ *Medico v. Time, Inc.*, 643 F.2d at 134; *Lal v. CBS, Inc.*, 551 F. Supp. 356, 361 (E.D. Pa. 1982), *aff'd.*, 726 F.2d 97 (3d Cir. 1984).

³⁸ It is no answer that media defendants are covered by insurance. First, it has been estimated that a quarter of all newspapers and broadcasters are not even insured. Anderson & Murdock, *Effects of Communications Law Decisions on Daily Newspaper Editors*, 58 Journalism Q. 525 (1981); Kupferberg, *Libel Fever*, Colum. Journalism Rev., Sept./Oct. 1981, at 36, 39; Franklin, *supra* note 2, at 265. Second, even for those that are insured, the possibility of an adverse claims history in the future and insurers' use of "deductibles and "retentions" mean that the threat of lawsuits remains a formidable one. *Id.* at 274-275.

³⁹ The ad hoc and often irrational nature of jury verdicts under the ephemeral negligence standard has led to a situation where "the very threat of protracted litigation along with frequent substantial damage awards will be sufficient to chill aggressive reporting and thereby impede the flow of information to the public." Bloom, *Proof of Fault in Media Defamation Litigation*, 38 Vand. L. Rev. 247, 253 (1985).

negligence standard, must also prove truth, the bias toward recovery will have shifted so significantly that a chilling effect is inevitable. This is the ultimate, practical result of the rule here at issue. It is a result not in the public interest, and not in keeping with the First Amendment. The Court should disapprove it.

CONCLUSION

For these reasons and those expressed by Appellants and the other *amici*, we urge the Court to reverse the decision and judgment of the Supreme Court of Pennsylvania.

Respectfully submitted,

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APPENDIX

APPENDIX A

DESCRIPTION OF AMICI

1. A.H. Belo Corporation—The A.H. Belo Corporation, a Texas corporation, publishes *The Dallas Morning News*, a daily newspaper in Dallas, Texas.

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Thomas S. Leatherbury
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2. American Broadcasting Company—The American Broadcasting Company, a division of American Broadcasting Companies, Inc., is a New York corporation which owns and operates a national television network (ABC), national radio networks, television and radio broadcasting stations, and, through various subsidiaries, also publishes magazines and books.

Sam Antar
Vice President & General Attorney
American Broadcasting Company
7 West 66th Street
New York, New York 10023

3. American Society of Newspaper Editors—The American Society of Newspaper Editors ("ASNE") is a nationwide professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States.

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Cohn & Marks
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Washington, D.C. 20036
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Newspaper Editors

4. Anniston Star Consolidated Publishing Company—The Anniston Star Consolidated Publishing Company is an Alabama corporation which publishes the *Anniston Star* and *Talladega Daily Home* daily newspapers and several weekly newspapers, all in the State of Alabama.

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Birmingham, Alabama 35203
Attorneys for Anniston Star Consolidated
Publishing Company

5. A.S. Abell Publishing Company—The A.S. Abell Publishing Company is a Maryland corporation which publishes *The Baltimore Sun* and *The Baltimore Evening Sun* newspapers in Baltimore, Maryland.

Douglas D. Connah, Jr.
Venable, Baetjer & Howard
1800 Mercantile Bank & Trust Building
Two Hopkins Plaza
Baltimore, Maryland 21201
Attorneys for A.S. Abell Publishing
Company, publisher of *The Baltimore Sun* and the *Baltimore Evening Sun*

6. Associated Press—The Associated Press, the world's largest newsgathering organization, is a mutual news cooperative organized under the Not-For-Profit Corporation Law of the State of New York, and engages in gathering and distributing news of local, national and international importance to its member newspaper and broadcast stations across the United States and throughout the world. The AP, on its own behalf and on behalf of its members, has a vital interest in protecting the right of the press to gather and publish news.

Richard N. Winfield
Rogers & Wells
200 Park Avenue
New York, New York 10166
Attorneys for the Associated Press

7. Associated Press Managing Editors—The Associated Press Managing Editors is a separate membership organization which includes more than 600 editors of newspaper members of the Associated Press, which gathers news worldwide for dissemination of 1,330 newspapers and 3,300 broadcast stations in the United States.

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Managing Editors

8. Bergen Record Corporation—The Bergen Record Corporation is a New Jersey corporation which publishes *The Record* and *The Sunday Record* newspapers from Hackensack, New Jersey.

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& Basralian
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9. Cable News Network, Inc.—Cable News Network, Inc., a subsidiary of Turner Broadcasting System, Inc., is the nation's only 24-hour television network, reaching more than 34 million homes domestically and many other outlets overseas.

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Vice President and General Counsel
Turner Broadcasting System, Inc.
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 Verner, Liipfert, Bernhard,
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 Washington, D.C. 20036
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 Network, Inc.

10. Central Newspapers, Inc.—Central Newspapers, Inc., publishes the following daily newspapers: *Indianapolis Star*, *Indianapolis News*, *Arizona Republic*, and *Phoenix Gazette*.

Edward O. DeLaney
 Barnes & Thornburg
 1313 Merchants Bank Building
 Indianapolis, Indiana 46204
 Attorneys for Central Newspapers, Inc.

11. Chronicle Publishing Company—The Chronicle Publishing Company is a Nevada corporation with its principal place of business in San Francisco, California, where it publishes the *San Francisco Chronicle*, a daily newspaper.

Neil L. Shapiro
 Maria L. Joseph
 Cooper, White & Cooper
 100 California Street, 16th Floor
 San Francisco, California 94111
 Attorneys for the Chronicle Publishing
 Company

12. The Copley Press, Inc.—The Copley Press, Inc., publishes *The San Diego Union* and *The Tribune* and nine other daily newspapers in California and Illinois with a combined circulation of more than 700,000.

Harold W. Fuson, Jr.
 Vice President and General Counsel
 The Copley Press, Inc.
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 La Jolla, California 92038-1530

13. The Courier Journal and Louisville Times Company—The Courier Journal and Louisville Times Company publishes *The Courier Journal* and *The Louisville Times*, which are daily newspapers published in Louisville, Kentucky.

Jon L. Fleischaker
 Wyatt, Tarrant & Combs
 2710 Citizens Plaza
 Louisville, Kentucky 40202
 Attorneys for The Courier Journal &
 Louisville Times Company

14. Deseret News Publishing Company—The Deseret News Publishing Company, a Utah corporation, publishes *The Deseret News*, an evening daily newspaper in Salt Lake City, Utah.

Wilford W. Kirton, Jr.
 Kirton, McComkie & Bushnell
 330 South Third East
 Salt Lake City, Utah 84111
 Attorneys for the Deseret News Publishing
 Company

15. *Des Moines Register*—The *Des Moines Register* is a daily newspaper in Des Moines, Iowa, and is circulated throughout the State of Iowa by the Des Moines Register and Tribune Company, an Iowa corporation.

16. *Detroit Free Press* *—The *Detroit Free Press* is a daily newspaper published in Detroit, Michigan, and distributed throughout the State of Michigan by Knight-Ridder Newspapers, Inc., a Florida corporation

Herschel Fink
 Honigman, Miller, Schwartz and Cohn
 2290 First National Building
 Detroit, Michigan 48226
 Attorneys for the *Detroit Free Press*

17. Donrey, Inc.—Donrey, Inc. is a Nevada corporation, which does business as Donrey Media Group, publishes 53 daily newspapers and 56 non-daily newspapers, and owns and operates 8 broadcast stations and 6 cable television companies in 20 states. Some of the daily newspapers published by the Donrey Media Group include: the *Las Vegas (Nev.) Review-Journal*, the *Southwest Times-Record* in Ft. Smith, Arkansas, the *Pomona (Calif.) Daily Bulletin*, the *Norman (Okla.) Transcript*, the *Sherman (Tex.) Democrat*, the *Hawaii Tribune Herald* in Hilo, Hawaii, the *Minot (N.D.) Daily News*, the *Macon (Mo.) Chronicle-Herald*, the *Picayune-Item* in Picayune, Mississippi, the *Glasgow (Ky.) Daily Times*, the *Columbia (Tenn.) Daily Herald*, the *Aberdeen (Wash.) Daily World* and the *Kent (Wash.) Daily News Journal*. Donrey Media Group also owns and operates radio stations KEXO-AM and KLDL-FM in Grand Junction, Colorado.

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 General Counsel
 David M. Olive
 Assistant General Counsel
 Donrey Media Group
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 Ft. Smith, Arkansas 72901

18. Evening Post Publishing Co.—The Evening Post Publishing Co., a South Carolina corporation, publishes *The Evening Post* and *The News and Courier*, which are daily newspapers published in Charleston, South Carolina and distributed throughout the State of South Carolina.

D.A. Brockington, Jr.
 Brockington, Brockington & Smith
 P. O. Box 663
 Charleston, South Carolina 29402
 Attorneys for The Evening Post
 Publishing Co.

19. Gaithersburg Publishing Company, Inc.—Gaithersburg Publishing Company, Inc. is a Maryland corporation which publishes the following weekly newspapers in Maryland: *Olney Courier-Gazette*, *The Gaithersburg Gazette*, *The Gazette*, *The Rockville Gazette*, *The Damascus Courier-Gazette*, and *The Mt. Airy Courier-Gazette*.

Theodore Sherbow
 Weinberg and Green
 100 South Charles Street
 Baltimore, Maryland 21201
 Attorneys for Gaithersburg Publishing
 Company

20. Globe Newspaper Company—Globe Newspaper Company publishes *The Boston Globe*, a daily newspaper in Boston, Massachusetts.

Robert Haydock, Jr.
 Bingham, Dana & Gould
 100 Federal Street
 15th Floor
 Boston, Massachusetts 02110
 Attorneys for Globe Newspaper Company

21. Great Falls Tribune Company—Great Falls Tribune Company publishes *The Great Falls Tribune*, a daily newspaper in Great Falls, Montana.

Peter Michael Meloy
 Meloy Law Firm
 P. O. Box 1241
 Helena, Montana 59624
 Attorneys for Great Falls Tribune Company

22. Gulf Publishing Company, Inc.—The Gulf Publishing Company, Inc., a Mississippi corporation, publishes: (i) *The Gulfport-Biloxi Daily Herald*, an evening daily newspaper published in Gulfport, Mississippi; and (ii) *The South Mississippi Sun*, a morning daily newspaper published in Gulfport, Mississippi.

W. Joel Blass
Mize, Thompson & Blass
P. O. Box 160
Gulfport, Mississippi 39501
Attorneys for Gulf Publishing Company, Inc.

23. The Hearst Corporation—The Hearst Corporation—more than 125 companies including newspapers, magazines, books, broadcasting and cable communications.

Jerome C. Dougherty
Pillsbury, Madison & Sutto
225 Bush Street
San Francisco, California 94120
Attorneys for The Hearst Corporation

24. The Highland Publishing Company—Highland Publishing Company is a Texas corporation with its principal place of business in Marble Falls, Texas, where it publishes: (i) *The Highlander*, the largest circulation (9,561) weekly newspaper in the State of Texas, and (ii) *Texas Fish and Game*, a monthly magazine.

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25. The Houston Chronicle Publishing Company—The Houston Chronicle Publishing Company is a Texas Corporation which publishes *The Houston Chronicle*, a daily newspaper in Houston, Texas.

William W. Ogden
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Houston, Texas 77002
Attorneys for The Houston Chronicle
Publishing Company

26. Houston Post Company—The Houston Post Company publishes *The Houston Post*, a daily morning newspaper published in Houston, Texas.

Rufus Wallingford
Fulbright & Jaworski
500 MBank Building
Houston, Texas 77002
Attorneys for Houston Post Company

27. Journal Publishing Company—The Journal Publishing Company, a New Mexico corporation, is the publisher of *The Albuquerque Journal*, a seven-days-a-week newspaper in Albuquerque, New Mexico, which is the largest circulation daily newspaper in the State of New Mexico.

Eric D. Lanphere
Michael A. Gross
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Albuquerque, New Mexico 87110
Attorneys for Journal Publishing Company

28. Landmark Communications, Inc.—Landmark Communications, Inc. is a Virginia corporation which publishes *The Virginian-Pilot* (each morning, Monday through Friday), *The Ledger-Star* (each afternoon, Monday through Friday), and a combined newspaper, *The Virginian-Pilot and The Ledger-Star* (on Saturday and Sunday mornings), which are circulated primarily in Norfolk, Portsmouth, Virginia Beach, Chesapeake and

Suffolk, Virginia, and in surrounding counties in Virginia and North Carolina. Through subsidiaries, Landmark Communications, Inc., also publishes: (i) the Greensboro *Daily News and Record*, an all-day, seven-days-a-week newspaper published from Greensboro, North Carolina; (ii) the *Roanoke Times & World News*, all-day, seven-days-a-week newspaper published from Roanoke, Virginia; (iii) 4 daily, 3 tri-weekly, 6 semi-weekly, 14 weekly, 2 free weekly, 22 shopping, and 8 special community newspapers and publications in California, Florida, Indiana, Illinois, Iowa, Kentucky, Maryland, Mississippi, New Mexico, Pennsylvania and Virginia; (iv) 3 weekly entertainment publications in Hampton Roads, Virginia; Richmond, Virginia; and Greensboro/Winston-Salem/High Point, North Carolina. Finally, Landmark Communications, Inc., also owns and operates television stations in San Jose, California (KNTV) and Las Vegas, Nevada (KLAS-TV), radio stations WTAR and WLTY-FM in Norfolk, Virginia, and The Weather Channel, Inc., a 24-hour weather service for cable television systems.

Mr. Louis Ryan
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Landmark Communications, Inc.
150 W. Brambleton Avenue
Norfolk, Virginia 23501

Conrad M. Shumadine
Wilcox & Savage
1800 Sovran Center
Norfolk, Virginia 23501
Attorneys for Landmark Communications, Inc.

29. *Los Angeles Times*—The *Los Angeles Times*, a division of The Times Mirror Company, is a daily newspaper published in Los Angeles, California; it also syndicates newspaper features and is the joint owner of a news service.

William A. Niese
Vice President and General Counsel
Jeffrey S. Klein
Staff Counsel
Los Angeles Times,
a division of the Times Mirror Company
Times Mirror Square
Los Angeles, California 90053

30. McClatchy Newspapers—McClatchy Newspapers, a California communications company since 1857, owns and operates ten newspapers in California, Washington and Alaska with a total circulation of over 600,000, including *The Sacramento Bee*, *The Fresno Bee*, *The Modesto Bee*, the *Tri-City Herald*, and *The Anchorage Daily News*.

Gary B. Pruitt
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McClatchy Newspapers
2100 "Q" Street
Sacramento, California 95852

31. The Miami Herald Publishing Company*—The Miami Herald Publishing Company is a division of Knight-Ridder Newspapers, Inc., a Florida corporation, and publishes *The Miami Herald*, a daily newspaper in Miami, Florida, which is distributed throughout the State of Florida.

Richard J. Ovelmen
Samuel A. Terilli
Office of the General Counsel
The Miami Herald Publishing Company
One Herald Plaza
Miami, Florida 33101

32. Minneapolis Star and Tribune Company—Minneapolis Star and Tribune Company is a Minnesota corporation which publishes *The Minneapolis Star and Trib-*

une, a seven-days-a-week newspaper which circulates throughout the State of Minnesota.

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429 Portland Avenue
Minneapolis, Minnesota 55488

32. National Association of Broadcasters—The National Association of Broadcasters ("NAB"), organized in 1922, is a non-profit incorporated association of radio and television broadcast stations and networks. NAB membership includes more than 4500 radio stations, 850 television stations, and the major commercial broadcast networks. Among NAB's members are more than 160 radio and television broadcasters in the Commonwealth of Pennsylvania.

Henry L. Baumann
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National Association of Broadcasters
1771 "N" Street, NW
Washington, D.C. 20036

34. News and Observer Publishing Company—The News and Observer Publishing Company is a North Carolina corporation whose principal place of business is located in Raleigh, Wake County, North Carolina. The company publishes *The News & Observer*, *The Raleigh Times*, and 18 other newspapers throughout North Carolina and South Carolina.

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35. News-Journal Corporation—The News-Journal Corporation, a Florida corporation, publishes the *Daytona Beach Morning Journal*, the *Daytona Beach Evening News*, and the *Sunday News Journal*, all of which are published in Daytona Beach, Florida.

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36. North Carolina Press Association, Inc.—The North Carolina Press Association, Inc. (the "NCPA") is a voluntary membership association chartered as a non-profit corporation under the laws of North Carolina. Its principal place of business is located at Suite 1100, 5 West Hargett Street, Raleigh, North Carolina 27602. Its membership consists of approximately 55 daily newspapers and 120 non-daily newspapers published throughout North Carolina.

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37. North Dakota Newspaper Association—The North Dakota Newspaper Association is a voluntary membership association chartered as a non-profit corporation under the laws of North Dakota. Its principal place of business is located at Box 8137, University Station, Grand Forks, North Dakota 58502. Its membership consists of every newspaper published from the State of North Dakota, including 10 daily newspapers and 87 non-daily newspapers.

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 Association

38. Oklahoma Publishing Company—The Oklahoma Publishing Company publishes *The Daily Oklahoman*, *The Saturday Oklahoman & Times* and *The Sunday Oklahoman*, all of which are published in Oklahoma City, Oklahoma.

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 Oklahoma City, Oklahoma 73102
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39. Omaha World-Herald Company—The Omaha World-Herald Company publishes the *Omaha World-Herald*, a daily newspaper in Omaha, Nebraska.

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 Suite 300
 10010 Regency Circle
 Omaha, Nebraska 68114
 Attorneys for Omaha World-Herald Company

40. Radio-Television News Directors Association ("RTNDA")—RTNDA is a professional organization of more than 2000 news directors and others who are active in the supervising, reporting, and editing of news and public affairs programming on radio and television, both broadcast and cable.

J. Laurent Scharff
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 Washington, D.C. 20036
 Attorneys for Radio-Television News
 Directors Association

41. Richmond Newspapers, Inc.—Richmond Newspapers, Inc., publishes a morning newspaper, the *Richmond Times-Dispatch*, and an evening newspaper, *The Richmond News Leader* (combined circulation in excess of 250,000 and Sunday morning circulation 230,878), which are distributed in 21 cities and 71 counties throughout the Commonwealth of Virginia.

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 1200 Mutual Building
 Richmond, Virginia 23219
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47. *Salt Lake Tribune*—The *Salt Lake Tribune* is a seven-days-a-week morning newspaper published in Salt Lake City, Utah, by Kearns-Tribune Corporation, a Utah corporation.

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 170 South Main Street
 Salt Lake City, Utah 84101
 Attorneys for the *Salt Lake Tribune*

43. *San Jose Mercury News**—The *San Jose Mercury News* is a daily newspaper published in San Jose, California by Knight-Ridder Newspapers, Inc., a Florida corporation.

Edward P. Davis, Jr.
Rankin, Oneal, Center, Luckhardt,
Lund & Hinshaw
Suite 300

2 West Santa Clara Street
San Jose, California 95115
Attorneys for *San Jose Mercury News*

44. Seattle Times Company—Seattle Times Company is a Delaware corporation with its principal place of business in Seattle, Washington where it publishes *The Seattle Times*, a daily newspaper.

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4200 Seattle First National Bank Building
Seattle, Washington 98154
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45. *The Tampa Tribune*—*The Tampa Tribune* is a daily newspaper in Tampa, Florida, published by The Tribune Company Inc., which is a subsidiary of Media General, Inc.

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Tampa, Florida 33602
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46. Times-Picayune Publishing Corporation—Times-Picayune Publishing Corporation, a Louisiana corporation, publishes *The Times-Picayune/States-Item*, a daily newspaper in New Orleans, Louisiana.

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Texaco Center
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47. Times Publishing Company—The Times Publishing Company is the publisher of the *St. Petersburg Times* and *Evening Independent*, daily newspapers which are published in St. Petersburg, Florida.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

PHILADELPHIA NEWSPAPERS, INC., *et al.*,

Appellants,

—v.—

MAURICE S. HEPPTS, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

**BRIEF
OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN
CIVIL LIBERTIES UNION OF PENNSYLVANIA, AMERICAN NEWS-
PAPER PUBLISHERS ASSOCIATION, ASSOCIATION OF AMERICAN
PUBLISHERS, DOW JONES & COMPANY, INC., GANNETT CO.,
INC., THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA
DELTA CHI, and TIME, INC., AS AMICI CURIAE IN SUPPORT OF
APPELLANTS**

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August 19, 1985

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1491

PHILADELPHIA NEWSPAPERS, INC., *et al.*,

Appellants,

—v.—

MAURICE S. HEPPTS, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

**MOTION FOR LEAVE TO FILE BRIEF
OF AMICI CURIAE**

The American Civil Liberties Union, The American Civil Liberties Union of Pennsylvania, American Newspaper Publishers Association, Association of American Publishers, Dow Jones & Company, Inc., Gannett Co., Inc., The Society of Professional Journalists, Sigma Delta Chi, and Time, Inc. move pursuant to Rule 36.3 of the Rules of the Supreme Court of the United States for leave to file a brief amicus curiae in support of Appellants. The written consent of the Appellants is on file with the Court. Appellees have not consented to the filing of this brief, although they do not oppose this motion. Their letter explaining their position is on file with the Court.

Each of the organizations which has joined as amici on this brief has a special interest in the resolution of the issues on appeal in this case. The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit membership organization of over 250,000 members dedicated to the

promotion and defense of the fundamental personal liberties guaranteed by the Constitution of the United States. The ACLU of Pennsylvania is the state chapter of the national organization which represents those interests in the State of Pennsylvania. Foremost among liberties defended by the ACLU are freedom of speech and freedom of the press protected by the First and Fourteenth Amendments. Moreover, the ACLU and its affiliates have traditionally defended citizens from arbitrary actions by state legislatures.

The American Newspaper Publishers Association is a national trade association of nearly 1,400 newspapers, representing about 99% of the daily newspaper circulation in the United States.

The Association of American Publishers, Inc. ("AAP"), a not-for-profit trade association organized under the laws of the State of New York, is the major national association of book publishers in the United States. AAP's approximately 325 members include most of the leading commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish in the aggregate a majority of all general and educational books published in the United States.

Dow Jones & Company, Inc. publishes, *inter alia*, *The Wall Street Journal*, *Barron's National Business and Financial Weekly*, a variety of national and international electronic news services, textbooks through its Richard D. Irwin, Inc. subsidiary, and 22 community daily newspapers through its Ottaway Newspapers, Inc. subsidiary.

Gannett Co., Inc. ("Gannett") publishes eighty-six daily newspapers throughout the United States, including the national newspaper *USA Today*. Gannett also publishes thirty-eight non-daily newspapers and *USA Weekend*, and in addition operates six television stations and fourteen radio stations.

The Society of Professional Journalists, Sigma Delta Chi is a voluntary, not-for-profit organization of nearly 28,000 mem-

bers representing every branch and rank of print and broadcast journalism. The Society's purposes, expressed by its founders in 1909, include "work to safeguard the flow of information from all sources to the public so that it has access to the truths required to make democracy function and to protect our freedoms."

Time Incorporated is the largest publisher of general circulation magazines in the United States. It publishes *TIME*, *FORTUNE*, *SPORTS ILLUSTRATED*, *PEOPLE*, *MONEY*, *LIFE* and *DISCOVER*.

The amici represent a broad spectrum of those citizens and organizations whose interests in free speech and free press are threatened by the decision of the Pennsylvania Supreme Court on review here. Because the amici and their members have historically contributed to the maintenance of freedom of the press and individual liberties, and because members of amici are often parties to similar lawsuits, the resolution of the Constitutional question to be decided by this Court will directly and pervasively affect them. The amici are particularly concerned with the national implications of the rulings at issue here and will present to the Court a broader perspective on the effect of state libel law on the freedoms of speech and press guaranteed by the First Amendment.

Respectfully submitted,

/s/ JOHN G. KOELTL

John G. Koeltl

Dated: August 19, 1985
New York, New York

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1491

PHILADELPHIA NEWSPAPERS, INC., et al.,

Appellants,

—v.—

MAURICE S. HEPPS, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION,
THE AMERICAN CIVIL LIBERTIES UNION OF PENN-
SYLVANIA, AMERICAN NEWSPAPER PUBLISHERS
ASSOCIATION, ASSOCIATION OF AMERICAN PUB-
LISHERS, DOW JONES & COMPANY, INC., GANNETT
CO., INC., THE SOCIETY OF PROFESSIONAL JOUR-
NALISTS, SIGMA DELTA CHI, and TIME, INC., AS
AMICI CURIAE IN SUPPORT OF APPELLANTS**

INTERESTS OF AMICI CURIAE

A motion for leave to file this brief is being presented today pursuant to Rule 36.3 of the Rules of this Court. The interests of amici curiae are set forth in the motion, which is bound with this brief as set forth in Rule 33.2(b). Placing the burden of proof on a defendant and presuming that a defamatory statement is false, which the Pennsylvania Supreme Court did in this case, deters truthful reporting and restricts public debate

by allowing the imposition of liability upon the press for printing the truth, and by discouraging truthful reporting when the truth of a report will be difficult to prove in court. Moreover, the statutory presumption of the falsity of published statements based on their defamatory character violates due process of law because there is no rational connection between the defamatory nature of a statement and its falsity. The legislative scheme represents a serious threat to the ability of the press to provide information to the public, and interferes with the public debate protected by the First Amendment, which are central concerns of the amici.

STATEMENT OF THE CASE

Between May 5, 1975 and May 2, 1976 *The Philadelphia Inquirer* printed five news articles which purportedly linked a prominent businessman and several beer and beverage distributorships to certain named "underworld" figures and to organized crime generally. (Joint Appendix, hereinafter "J.A.," A60-A74.) Maurice S. Hepps, the individual plaintiff, was the principal stockholder of a corporate plaintiff, General Programming Inc., which owns the trademarks "Thrifty Beverage" and "Brewer's Outlet," licenses these trademarks, and provides management and consulting services to licensees. Corporate and individual licensees were also plaintiffs. As a result of these articles the plaintiffs instituted a civil action for libel against Philadelphia Newspapers Inc., which publishes *The Philadelphia Inquirer*, and two reporters who prepared the articles. (J.A. A155)

In July, 1981, after a six-week trial in the Pennsylvania Court of Common Pleas, the jury returned a general verdict in favor of the newspaper and the reporters. (J.A. A107) Prior to instructing the jury, the trial court declared unconstitutional 42 Pa. Cons. Stat. Ann. § 8343(b)(1) (Purdon 1982), which places the burden of proving the truth of a defamatory statement on defendants in libel actions. In a subsequent opinion explaining its ruling, the trial court held that in a libel action

brought by a "private figure" against a media defendant, the First Amendment, as interpreted in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), requires that the plaintiff bear the burden of proving the falsity of the defamatory publication. (J.A. A108) The court noted that in *Gertz*, this Court held that the states may not impose "liability without fault" in libel cases brought by private persons. 418 U.S. at 347. The trial court reasoned that because the allocation to defendants of the burden of proof for truth will sometimes result in liability without fault, *Gertz* requires a private figure plaintiff to prove "falsity." After surveying the significant support for its interpretation, at both the state and the federal level, the trial court concluded that the Pennsylvania statute in question, if held to be constitutional, would "distort the balance the Court struck in *Gertz*." (J.A. A131)

The Supreme Court of Pennsylvania reversed, holding it constitutional to place on media defendants the burden of proving the truth of an allegedly libelous statement. *Hepps v. Philadelphia Newspapers*, 485 A.2d 374 (Pa. 1984) (J.A. A155). The Supreme Court reasoned that *Gertz* required only that the states not impose liability for libel without fault and that Pennsylvania still required a libel plaintiff to prove negligence although not falsity as part of the plaintiff's case. The Supreme Court also explained that while falsity is an element of the tort of libel, that element is presumed in Pennsylvania from the injurious nature of the words. 485 A.2d at 379 and n.2. The court found no constitutional infirmity in the statute, relying on the common law presumption of falsity, evidentiary convenience, and general state policy to uphold the Pennsylvania libel law. (J.A. A161-A175)

SUMMARY OF THE ARGUMENT

Pennsylvania's statute imposing the burden of proving the truth of defamatory statements on media defendants violates the First Amendment. Allocating the burden of proof to defendants will permit civil liability for libel when the fact finder has made no finding that a defamatory statement is false. The First Amendment does not permit the Pennsylvania legislature's choice to err on the side of penalizing fully protected truthful speech. Moreover, the assumption of the burden of proof forces media defendants to calculate not whether what they print is true, but rather whether they will be able to prove in court that what they print is true. Such a calculation impermissibly impedes the wide-open and robust debate guaranteed by the First Amendment.

Pennsylvania's burden of proof, which presumes the falsity of a statement solely from its defamatory character, violates the due process clause of the Fourteenth Amendment because there is no rational connection between the fact that a statement is defamatory and the presumption that it is false. This irrational presumption precludes the reasoned decision-making that the Constitution requires of courts.

ARGUMENT

I. THE PENNSYLVANIA STATUTE IMPOSING THE BURDEN OF PROVING THE TRUTH OF A DEFAMATORY STATEMENT ON THE DEFENDANT IN A LIBEL ACTION VIOLATES THE FIRST AMENDMENT.

A. Imposing the Burden of Proving Truth on Defendants Unconstitutionally Sanctions Truthful Speech.

Allocating to the defendant the burden of proving truth in a libel case is a conscious government choice to permit truthful speech to be punished by civil damage awards. There will always be cases where the evidence is unclear concerning whether published statements are true or false. Allocating the burden of proof on the issue of truth or falsity is the means by which the government chooses whether, if an error is made on that issue, the error will penalize a truthful statement or allow a false statement to go uncompensated. By requiring the defendant to prove truth as a defense, the government increases the number of cases where truthful speech will be penalized as libelous. The First Amendment prohibits the government from consciously allowing truthful speech to be penalized. The government must err on the side of protecting what may be false speech to avoid penalizing protected, truthful speech.

This Court has held for over twenty years that state libel laws must comply with First Amendment requirements. See *New York Times v. Sullivan*, 376 U.S. 254 (1964) (public officials); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (public figures). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court held that states could not impose "liability without fault" for defamatory falsehoods injurious to private individuals. *Id.* at 347. The Court thereby removed libelous words from the class of speech "wholly unprotected by the First Amendment. . . ." *Id.* at 370 (White, J., dissenting). This past Term, in *Dun & Bradstreet, Inc. v. Greenmoss*

Builders, 53 U.S.L.W. 4866 (U.S. June 26, 1985), this Court explained that the rules set out in *Gertz* should be limited to statements about matters of "public concern."

This case, like *Gertz*, is a libel action by a "private figure" regarding defamatory statements of "public concern." The purportedly libelous statements concerned alleged links of a prominent businessman and organizations to organized crime. They were published over the course of a year by a major newspaper with a circulation far wider than the five subscribers who received the credit report in *Dun & Bradstreet*. The articles deal with matters of public concern that comprise part of the "uninhibited, robust, and wide-open" debate on public issues that lies at the heart of First Amendment protection. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

In its libel decisions from *New York Times* through *Dun & Bradstreet*, this Court has attempted to reach "the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz*, 418 U.S. at 325. Those decisions have sought to meet two goals: to protect truthful speech by providing the "breathing space" required by the First Amendment and to allow injured plaintiffs to be compensated for harm to their reputation. See *New York Times v. Sullivan*, 376 U.S. 254, 271-72 (1964). In striking the proper balance between these competing aims, the Court has always recognized that "the crucial question is the degree to which the law of defamation actually constrains the communication of truthful information." L. Tribe, *American Constitutional Law*, § 12-13, at 641 (1978). As the Court recently described its ultimate goal:

Realistically . . . some error is inevitable; and the difficulties of separating fact from fiction convinced the Court in *New York Times*, *Butts*, *Gertz* and similar cases to limit liability to instances where some degree of culpability is present in order to eliminate the risk of undue self-censorship and the suppression of truthful material.

Herbert v. Lando, 441 U.S. 153, 171-72 (1979) (emphasis added).

Requiring the defendant to prove the truth of a defamatory statement as a defense will inevitably penalize some truthful speech in books, newspapers and other media.¹ The burden of proof operates so that in close cases, when a jury is unable to decide a fact in issue, the jury will decide against the party bearing the burden of proof. See *Lohman v. General American Life Insurance Co.*, 478 F.2d 719, 726 (8th Cir.), cert. denied, 414 U.S. 857 (1973); E. Cleary, *McCormick on Evidence*, § 336, at 947 (3d ed. 1984). The burden of proof thus serves as a mechanism for "handicapping a disfavored contention," E. Cleary, *McCormick on Evidence*, § 337, at 950 (3d ed. 1984), and allocating the risks of error and loss:

selection of a burden of proof rule requires a choice as to which party should be assigned the risk of loss in the event that the uncertainties in the evidence make it difficult to say that the fact in dispute is more likely so than not so.

Caiazzo v. Volkswagenwerk A.G., 647 F.2d 241, 255 (2d Cir. 1981) (Newman, J., concurring in part and dissenting in part).

In libel cases, the allocation of the burden of proving truth or falsity reflects an inescapable choice of preferred error: because judges and juries will inevitably make some errors in

¹ Forcing a libel defendant to carry the burden of proof also punishes and deters truthful individual expression. As libel suits against individuals increase, if individual defendants must bear the risk of a fact finder's error and must determine before speaking out whether they will be able to prove their statement in court, individual expression will be severely compromised. Some individual truthful speech will be silenced or punished. See Ketcham, *Libel Suit: Tool Against Activism?*, N.Y. Times, Apr. 7, 1985, § 11L1, at 10, col. 3; Greenhouse, *Outspoken Private Critics of Officials Increasingly Face Slander Lawsuits*, N.Y. Times, Feb. 14, 1985, at B11, col. 1. Since individuals have fewer resources than most media they face the greatest threat of intimidation by libel suits. When speakers bear the burden of proof, public officials and other potential libel plaintiffs are encouraged to use libel complaints in order to silence their critics. The First Amendment prohibits such a deterrent effect on individual speech.

deciding what is truth, the issue is whether the fact finder should err more often in penalizing truthful speech or in failing to penalize false speech. The First Amendment requires that the government not err on the side of penalizing truthful speech. While the states are surely entitled to use libel laws to protect reputational interests, the states cannot structure libel laws to punish consciously the publication of truthful facts. Cf. *Paul v. Davis*, 424 U.S. 693 (1976). The First Amendment cannot tolerate a procedural device that "handicaps" the contention that the speech at issue is truthful and thus permits speech to be sanctioned without any finding that it is false.

In the normal civil suit where [the preponderance of the evidence] standard is employed, 'we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor.' *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring). *In libel cases, however, we view an erroneous verdict for the plaintiff as most serious.* Not only does it mulct the defendant for an innocent misstatement . . . but the possibility of such error, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate.

Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50 (1971) (Opinion of Brennan, J.) (emphasis added).

This Court has recognized the importance of the burden of proof in protecting First Amendment interests by requiring that the plaintiff prove the falsity of any defamatory statement with clear and convincing evidence in libel suits against public officials and public figures. See *New York Times v. Sullivan*, 376 U.S. 254, 285-86 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (interpreting *New York Times* to require proof of falsity). These decisions recognize the powerful function that proof rules serve in allocating the risks of jury speculation and error in libel trials. Indeed, in *Herbert v. Lando*, 441 U.S. 153 (1979), this Court assumed that a libel plaintiff is required to prove falsity:

Although defamation litigation, including suits against the press, is an ancient phenomenon, it is true that our cases from *New York Times* to *Gertz* have considerably changed the profile of such cases. In years gone by, plaintiffs made out a prima facie case by proving the damaging publication. Truth and privilege were defenses The plaintiff's burden is now considerably expanded. In every or almost every case, *the plaintiff must focus on the editorial process and prove a false publication* attended by some degree of culpability on the part of the publisher.

441 U.S. at 175-176 (emphasis added).

Requiring the plaintiff to prove falsity in a libel action is consistent with this Court's refusal to sacrifice protected speech in order to regulate unprotected speech. In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983), this Court held that restrictions on purportedly commercial speech "must be examined carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." And in *Freedman v. Maryland*, 380 U.S. 51, 60 (1965), the Court invalidated a state law requiring licensing of films by a State Board because it "fail[ed] to provide adequate safeguards against undue inhibition of protected expression." This Court has recognized that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn The separation of legitimate from illegitimate speech calls for . . . sensitive tools" *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

To prevent the erroneous punishment of fully protected speech, this Court has held in a variety of contexts that all speech is presumptively protected. The burden of proving that speech is unprotected must lie with those who would impose sanctions. The Court has stated that "when the constitutional right to speak is sought to be deterred . . . due process demands that speech be unencumbered until the [party seeking to inhibit it] comes forward with sufficient proof to justify its

inhibition." *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958). The Court has found it impermissible to require that a party seeking a tax exemption prove that he had not engaged in criminal speech, see *Speiser v. Randall*, 357 U.S. 513 (1958), that a movie exhibitor prove that his film was worthy of a license, see *Freedman v. Maryland*, 380 U.S. 51 (1965), or that sellers of allegedly obscene magazines prove that their wares were not obscene, see *Blount v. Rizzi*, 400 U.S. 410 (1971).²

The Court has insisted on placing the burden of proving that speech is unprotected on those who would restrict or punish speech. That is the only way to assure that fully protected speech will not be impermissibly sanctioned. It is the plaintiff in a libel case, therefore, who must show that the challenged speech is not protected as truthful speech. When the evidence in a libel suit is in equipoise, and the fact finder cannot say whether a defamatory statement is more likely to be false than true, it is constitutionally impermissible to penalize presumptively truthful speech, which has not been proven to be false.

B. Imposing the Burden of Proving Truth on Defendants Unconstitutionally Deters Truthful Reporting.

This Court has recognized the impermissible deterrent effect that the imposition of the burden of proof can have on First Amendment freedoms. In *Speiser v. Randall*, 357 U.S. 513 (1958), the Court found unconstitutional a requirement that applicants for a tax exemption prove that they did not advocate the overthrow of the United States government by force or by violence:

The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct neces-

² The Pennsylvania scheme is particularly offensive because it not only shifts the burden of proof, but presumes that speech of a defamatory character is false rather than true. See *Hepps*, 485 A.2d at 378; *infra* at p.13. Presuming that speech is false allows such speech to be punished without any actual proof that the speech is in fact unprotected. The First Amendment does not tolerate such punishment. See *Speiser v. Randall*, 357 U.S. at 528.

sarily must steer far wider of the unlawful zone than if the State must bear these burdens [This procedural device] can only result in a deterrence of speech which the Constitution makes free.

Id. at 526.

Placing the burden of proving truth on defendants in a libel action will require defendants to consider not only whether what they published is true but whether they will be able to prove such truth in court. The press will often be unable to carry that burden because of the unique difficulties they face in attempting to prove truth. Witnesses may be unavailable or unwilling to testify to the truth of "vehement, caustic and sometimes unpleasantly sharp" defamatory statements. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). And when sources do choose to testify, they may have an incentive to lie. They may seek to disown what they had previously told reporters outside court, and they may want to avoid being sued themselves. See Franklin, *What Does "Negligence" Mean in Defamation Cases?*, 6 Comm/Ent L.J. 259, 279 (1984). There are many types of news about which the public should be informed but whose truth will be very difficult to prove in court. Cf. *Cervantes v. Time, Inc.*, 464 F.2d 986, 991 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (links between mayor and organized crime difficult to prove). Because proving the truth of a printed statement often depends on in-court corroboration from sources, and because issues of witness credibility will often be resolved against media defendants, see Franklin, *supra*, p. 15, at 279, it will often be difficult for the press to prove "truth" at trial. These difficulties are compounded by the fact that only the plaintiff in a libel action knows with *certainty* whether the defamatory statement is true—a reason commonly given for the placement of the burden of proof on a party. See E. Cleary, *McCormick on Evidence*, § 337, at 950 (1984).

The result of these difficulties of proof will be to deter truthful reporting:

[t]he very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to "steer far wider of the unlawful zone" thereby keeping protected discussion from public cognizance.

Rosenbloom v. Metromedia, Inc. 403 U.S. 29, 52-53 (1971). The recent increases in the number of libel suits filed and the size of damage awards, see Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. Pa. L. Rev. 1, 1-2, 6-7 (1983) (typical damage award is in the millions of dollars; average punitive damage award is almost \$8 million), already pose a threat of illegitimate suits:

The prospect of such lucrative awards is likely to entice more potential defamation plaintiffs to bring suit, despite the fact that their claims do not meet the legal standards that appellate courts are struggling to impose.

Id. at 7.

The cost of defense and settlement will especially inhibit expression by small newspapers and other publications. They are more likely to be uninsured and less likely to be able to absorb the costs of a large lawsuit or damage award. See Curley, *How Libel Suit Sapped the Crusading Spirit of a Small Newspaper*, Wall St. J., Sept. 29, 1983, at 1, col. 1 (describing \$9.2 million damage award against the *Alton Telegraph*); Franklin, *supra*, p.15, at 277-280; Smolla, *supra*, p. 12, at 12-13. In *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 53 U.S.L.W. 4866 (U.S. June 26, 1985), this Court made clear that the First Amendment protections against libel charges extend to defendants beyond large media defendants. Small, uninsured, or less established publications may find their very existence threatened by the need to prove in court that their investigative reporting is true.

Detering the press from vigorous reporting infringes the First Amendment rights not only of the press but of the public

to receive information. This Court has long recognized that the public's interest in receiving news is of constitutional dimensions, see *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), and that this interest strengthens the protection afforded willing speakers, see *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976); *Procunier v. Martinez*, 416 U.S. 396 (1974); *Marsh v. Alabama*, 326 U.S. 501 (1946). The right of the public to receive truthful news—undampened and undistorted by the threat of adverse libel judgments—strengthens the media's already significant interest in procedural safeguards against libel judgments for truthful speech.

II. THE PENNSYLVANIA STATUTE VIOLATES DUE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT BY PRESUMING THE FALSITY OF A PUBLISHED STATEMENT SOLELY FROM THE STATEMENT'S DEFAMATORY CHARACTER.

Pennsylvania has imposed the burden of proving "the truth of the defamatory communication" on the defendant in a defamation case. 42 Pa. Cons. Stat. Ann. § 8343 (Purdon 1982). As the Pennsylvania Supreme Court explained, central to the Pennsylvania statutory scheme is the "presumption of falsity of the defamatory words." *Hepps v. Philadelphia Newspapers*, 485 A.2d 374, 378 (Pa. 1984). While falsity is an element of the tort of libel, falsity is presumed solely from the defamatory nature of the words. *Id.* at 378-79 and n.2. The burden is then on the defendant to establish the truth of what was published.

Under the Pennsylvania allocation of proof, if the trier of fact cannot ascertain the truth or falsity of a defamatory statement, the statement must be presumed false. This statutory presumption violates due process guaranteed by the Fourteenth Amendment because the presumption of falsity bears no

rational connection to the proven fact that a statement is of a defamatory character.³

A legislative presumption of one fact from evidence of another violates due process if there is no "rational connection between the fact proved and the ultimate fact presumed . . . the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." *Mobile J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910). This Court has therefore invalidated statutory civil presumptions when there was no "rational connection" between the fact proven and the fact statutorily presumed. *Western & Atlantic Railroad v. Henderson*, 279 U.S. 639 (1929). An irrational presumption cannot provide an element of a tort action. *Henderson*, 279 U.S. at 642. A state cannot define a tort, such as libel, to include an element, such as falsity, and then allow that element to be defined away by an irrational presumption.

In *Henderson*, this Court held that a Georgia statutory presumption violated due process by presuming, solely from the existence of a railroad grade crossing collision, that the railway company involved was negligent and that its negligence was the proximate cause of all damages resulting from the collision.

The mere fact of collision between a railway train and a vehicle at a highway grade crossing furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company or of the traveler on the highway or of both or without fault of anyone. Reasoning does not lead from the occurrence back to its cause.

Henderson, 279 U.S. at 642-643.

3 The standards for assessing the constitutionality of the Pennsylvania burden of proof are identical to standards relevant to reviewing statutory presumptions because the effect of the burden placement is equivalent to a presumption of falsity. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 27 (1976). "There are outer limits on shifting the burden of production to a defendant, limits articulated in a long line of cases in this Court passing on the validity of presumptions." *Patterson v. New York*, 432 U.S. 197, 230 n. 16 (1977) (Powell, J., dissenting).

Rationality is required so that the legislature cannot arbitrarily deprive a disfavored person, profession, or industry of a fair chance in court. Irrational presumptions are inherently suspect because they can severely tilt the balance of a trial against a party for no apparent reason. They are especially dangerous in the First Amendment context because of their potential to punish or deter valuable truthful speech. Irrational presumptions often "have no foundation except the intent to destroy" and must be invalidated. *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 85-86 (1916). "Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property." *Henderson*, 279 U.S. at 642. A statute creating a presumption that is arbitrary or does not rest on any definite basis violates the due process clause of the Fourteenth Amendment. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976); *Manley v. Georgia*, 279 U.S. 1, 6 (1929); *Henderson*, 279 U.S. at 642; *McFarland*, 241 U.S. at 86; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 81-83 (1911); see *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 18-19 (1931) ("There must be some rational connection between the fact proved and the ultimate fact presumed. The legislative presumption is invalid when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense.").⁴

4 Similarly, in the criminal context, a statutory presumption of one fact from the existence of another has been held unconstitutional when the two were not rationally related. *Tot v. United States*, 319 U.S. 463, 467-468 (1943). The *Tot* standard has been interpreted to require not only a "rational connection" but, in addition, a statutory presumption "must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is *more likely than not* to flow from the proved fact on which it is made to depend." *Leary v. United States*, 395 U.S. 6, 36 (1969) (emphasis added). Accord, *Ulster County Court v. Allen*, 442 U.S. 140 (1979); *Turner v. United States*, 396 U.S. 398 (1970). The "rational connection" test and "more-likely-than-not" standard are fundamentally equivalent. Any differences in the formulations are "traceable in large part to variations in language and focus rather than to differences in substance." *Barnes v. United States*, 412 U.S. 837, 843 (1973).

Presuming that a published statement is false solely from the fact that it has a defamatory character is utterly irrational and unconstitutional. Proof that a statement has the potential to injure reputation does not demonstrate that the statement is false.

Nothing in "common experience" suggests a connection between defamatory statements and falsity. See *Tot*, 319 U.S. at 467-468. Indeed it would be incredible to assume that even a substantial portion of defamatory statements published in books and newspapers is false. The press publishes information about events which sometimes harms the reputations of individuals. But the wrongdoing which forms the basis for news will, unfortunately, often be true. See *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *United States v. Mandel*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *United States v. Halderman*, 559 F.2d 31 (D.C. Cir. 1976) (*en banc*) (*per curiam*), *cert. denied*, 431 U.S. 933 (1977). The vast number of criminal cases that have clogged the courts, including prosecutions of public officials, public figures, or businessmen, testify to the obvious fact that reporting about defamatory facts will often be all too true. "In libel and slander cases generally, there is no particular causal connection between the proved fact (the making of a derogatory statement) and the presumed fact (the falsity of the statement). There is no particular reason to presume falsity." *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371, 376 (6th Cir.), *cert. granted*, 454 U.S. 962, *cert. dismissed*, 454 U.S. 1130 (1981).

Pennsylvania's presumption that defamatory statements are false derives from the common law of libel. *Hepps*, 485 A.2d at 378. The common law assumed that the reputation of a defamed individual was "good." This primary assumption was based on the notion that "any man accused of wrongdoing is presumed innocent until proven guilty." *Id.* Since defamatory statements harm reputation, a necessary corollary to preserve the assumption of good reputation was the presumption of the falsity of defamatory statements, which suggested "bad" reputation. The presumption of falsity was, therefore, not based on

any facts, knowledge, or evidence of the falsity of the statement, but only on the primary assumption of "good" character. That roundabout rationale remains the basis for Pennsylvania's presumption. *Id.* at 378-380.⁵

Despite this Court's recent acknowledgement that "[t]he process of making the determination of rationality [of statutory presumptions], by its nature, is highly empirical," *Usery*, 428 U.S. at 28 (citing *United States v. Gainey*, 380 U.S. 63, 67 (1965)), the Pennsylvania presumption is based on no set of data suggesting that defamatory statements are more likely than not to be false, contrary to due process standards. The presumption lacks any rational empirical or factual basis.

The second purported rationale for the Pennsylvania presumption of falsity of defamatory words is that "the absence of such a presumption would force the plaintiff in the unenviable position of proving the negative."⁶ *Hepps*, 485 A.2d at 378; *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 448-49, 273 A.2d 899, 907 (1971). Falsity is presumed based on the notion that it will be more convenient for the person who printed the statement to prove truth since he, "knows precisely what particular event he is referring to and the source of his information, whereas the plaintiff, not knowing these facts, would experience great difficulty in refuting these general charges by showing their falsity."⁷ *Hepps*, 485 A.2d at 378

5 If the goal of the Pennsylvania legislature is truly to serve the principle that "any man accused of wrongdoing is presumed innocent until proven guilty," *Hepps*, 385 A.2d at 378, media defendants should be presumed to publish true, as opposed to false, statements.

6 Libel plaintiffs will often not have to prove a negative. Whether the positive or negative must be proved depends only on what a defamatory statement says. For example, if a newspaper publishes the statement "Mr. X has never done a valuable service for this community," Mr. X must prove the positive to rebut the defamatory words.

7 In fact, it may be more convenient for a libel plaintiff to prove falsity since he has the most information about himself and his reputation. Only the plaintiff knows with certainty whether what is said about him is true.

(citing *Corabi*, 441 Pa. at 450-51). However, a presumption's evidentiary convenience or efficiency cannot establish its constitutionality. Due process demands that a presumption bear some rational connection to an established fact. *Usery*, 428 U.S. 1; *Bandini*, 284 U.S. 8; *Henderson*, 279 U.S. 639; *Turnipseed*, 219 U.S. 35; see *Turner*, 396 U.S. 398; *Leary*, 395 U.S. 6; *Tot*, 319 U.S. 463. "The argument from convenience is admissible only where the inference is a permissible one" *Tot*, 319 U.S. at 469, *Leary*, 395 U.S. at 34. Irrational presumptions with no basis in fact are never permissible. Since the presumption of falsity is not rationally connected to the fact that a statement is defamatory, the presumption's alleged convenience cannot save it from violating due process.

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be reversed.

Respectfully submitted,

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No. 84-1491

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

PHILADELPHIA NEWSPAPERS, INC., *et al.*,
Appellants,

v.

MAURICE S. HEPPS, *et al.*,
Appellees

On Appeal from the Supreme Court of Pennsylvania

[REDACTED] BRIEF OF THE
AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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On Appeal from the Supreme Court of Pennsylvania

**MOTION OF THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*
IN SUPPORT OF APPELLANTS**

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 95 national and international labor organizations having a total membership of approximately 13,500,000 working men and women, moves the Court for leave to file the attached brief *amicus curiae* in support of appellants. Appellees have refused to consent to the filing of said brief.

The AFL-CIO and its affiliated unions participate actively in the public dialogue on issues of concern to workers at the local, state and national level. At issue

in this case is whether the First Amendment permits the use of the libel laws to penalize those who speak on matters of public concern unless it is established that such speech is false. The resolution of that issue is of profound concern to all who participate in the debate on public issues and to all who believe that such debate should be uninhibited. Accordingly, the AFL-CIO seeks leave to file the attached brief *amicus curiae* to demonstrate that under the First Amendment, truthful statements on matters of public concern are constitutionally protected even if such statements are injurious to the reputation of another, and that the First Amendment does not allow damages to be awarded against one who speaks on a matter of public concern in the absence of a proper finding that the statement in question is false.

For the foregoing reasons this motion for leave to file the attached brief *amicus curiae* should be granted.

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On Appeal from the Supreme Court of Pennsylvania

**BRIEF OF THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE IN SUPPORT OF APPELLANTS**

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") submits this brief *amicus curiae* contingent upon the granting of the foregoing motion for leave to file said brief. The interest of the *amicus curiae* is stated in that motion.

SUMMARY OF ARGUMENT

The question presented here is unlike the ones that have been posed to this Court in the cases following *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Those cases all involved speech which was proven (or at least assumed) to be false and which therefore "carrie[d] no First Amendment credentials," *Herbert v. Lando*, 441

U.S. 153, 171 (1979). The issue in those cases was whether to "extend a measure of *strategic protection*," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (emphasis added), to such speech in order not to chill the dissemination of truthful speech. In this case, in contrast, what is at issue is one aspect of the procedures for determining whether speech on a matter of public concern is true or false. The resolution of that issue does not turn on the prophylactic considerations that have been determinative in past cases, but rather on more elementary principles of First Amendment jurisprudence. Part A, pp. 4-7 *infra*.

The First Amendment embodies our "profound national commitment to the principle that debate on public issue should be uninhibited, robust and wide-open." *New York Times*, *supra*, 376 U.S. at 270. Given this commitment, the Court has concluded that the interest in truthful expression on matters of public concern outweighs the countervailing interests of those whose reputation may be injured by such expression, regardless of the speaker's motivation in making the truthful publication. Because true statements on public issues are constitutionally protected, their publication may not form the basis for an award of damages. And this in turn requires that, in a defamation action, before a defendant/speaker may be required to pay damages on account of his speech, the plaintiff must prove that the speech is false and therefore unprotected. Any other rule would permit speech to be sanctioned, through civil damages, absent proof that (or where the evidence is in equipoise as to whether) the speech is false and therefore stands outside the protective umbrella of the First Amendment. Part B, pp. 8-11, *infra*.

In the context of the prophylactic rules of culpability formulated in *New York Times* and its progeny the Court has recognized as much. Those cases hold that where non-culpable, false speech is entitled to "strategic protection," the burden of proving culpability rests on the plaintiff. If

a plaintiff is required to prove that a defamatory falsehood does not qualify for "strategic protection," it follows *a fortiori* that the plaintiff must also be required to prove that a defamatory statement is false and therefore does not qualify for the protection to which truthful speech is entitled in its own right. Part C, pp. 11-12 *infra*.

The Pennsylvania Supreme Court's contrary view rests on its conclusion that there is no "legitimate constitutionally protected interest in condoning the media's malicious or negligent discharge" of its informational function. But given the values and purposes of the First Amendment, there is an overriding interest in disseminating truthful information, and it is contrary to the First Amendment to punish the publication of truthful information simply because the media did not act responsibly in deciding to publish the information. Part D, pp. 12-14, *infra*.

This conclusion is confirmed by decisions of the Court involving analogous First Amendment questions. In the obscenity cases, for example, the Court has concluded that "the burden of proving that the [speech] is unprotected expression must rest on the censor." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). And in *Speiser v. Randall*, 357 U.S. 513 (1958), the Court held that California had violated the First Amendment by requiring taxpayers to prove that they had not engaged in unprotected expression in order to qualify for a tax exemption; the First Amendment, the Court concluded, required the State to assume the burden of persuasion on that issue. The reasoning of those decisions is fully applicable here. Part E, pp. 14-16 *infra*.

ARGUMENT

THE FIRST AMENDMENT DOES NOT ALLOW THE AWARD OF DAMAGES IN A DEFAMATION ACTION UNLESS THE PLAINTIFF ESTABLISHES THAT THE DEFAMATORY STATEMENT IS FALSE

The brightness of the constitutional principles stated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), has been tarnished by twenty years of litigation generated by the tension between our "society's interest in 'uninhibited robust and wide-open' debate on public issues" and the "legitimate state interest" in preserving "the individual's right to the protection of his own good name" from "the harm inflicted . . . by defamatory falsehood," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 341 (1974). The instant case permits us to see again, cleaned of that coating, the unalloyed truth of *New York Times'* most basic teaching: "What a state may not constitutionally bring about by means of criminal statute is likewise beyond the reach of its civil law of libel." 376 U.S. at 277. As we show below, so long as that much is granted—so long as it is recognized that the term "libel" is no talisman that forecloses First Amendment analysis and that "a State cannot foreclose the exercise of constitutional rights by mere labels," *NAACP v. Button*, 371 U.S. 415, 429 (1963)—it is plain that the Pennsylvania rule at issue here cuts deeply into free speech on public issues and is not justified by any countervailing state interest.

A. The question presented here is unlike the ones that have been posed to and have divided this Court in the years since *New York Times*.¹ Those disputes all involved speech which was held to be both defamatory and false.

¹ As the court below noted, there is language in several of this Court's prior decisions which appears to address the issue posed here and to "state[] the *New York Times* holding as requiring proof of falsity as part of the plaintiff's prima facie case." Pet. App. A-11

In this case what is at issue is precisely whether the speech in question is true or false.

This difference is of central legal significance because, as the Court repeatedly has concluded, "there is no constitutional value in false statements of fact." *Gertz, supra*, 418 U.S. at 340. "Neither lies nor false communications serve the ends of the First Amendment," *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968), and thus "[s]preading false information in and of itself carries no First Amendment credentials," *Herbert v. Lando*, 441 U.S. 153, 171 (1979). Rather, "the intended lie [and] the careless error . . . belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them

n.4, citing *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) ("a public official might be allowed the civil remedy only if he establishes that the utterance was false"); *Rosenblatt v. Baer*, 389 U.S. 75, 84 (1966); *Greenbelt Corp. Pub. Ass'n v. Bresler*, 398 U.S. 6, 8 (1970). Most recently, in *Herbert v. Lando*, 441 U.S. 153, 175-76 (1979), the Court stated:

Although defamation litigation . . . is an ancient phenomenon, it is true that our cases from *New York Times* to *Gertz* have considerably changed the profile of such cases. In years gone by, plaintiffs made out a prima facie case by proving the damaging publication. Truth and privileges were defenses. . . . The plaintiff's burden is now considerably expanded. In every or almost every case, the plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability on the part of the publisher. [Emphasis added]

At the same time, as the court below also noted, there is dictum in other opinions that looks the other way, or at least is unclear. E.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 490 (1975) ("the defense of truth is constitutionally required where the subject of the publication is a public official or public figure. What is more, the defamed public official or public figure must prove not only that the publication is false but it was knowingly so or was circulated with reckless disregard for its truth or falsity") (emphasis added).

For purposes of this brief, we treat the issue presented here as one of first impression in this Court.

is clearly outweighed by the social interest in order and morality.' " *Gertz, supra*, 418 U.S. at 340.

Because that is so, the issue in this Court's prior cases has been whether to "extend a measure of *strategic* protection to defamatory falsehood," in order to "assure to freedom of speech and press that 'breathing space' essential to their fruitful exercise." *Id.* at 342 (emphasis added). The Court has reasoned that "[a]lthough the erroneous statement of fact is not worthy of constitutional protection, it is nonetheless inevitable in free debate" and that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id.* at 340-41. See also *St. Amant v. Thompson, supra*, 390 U.S. at 732.²

To determine how much "strategic protection" to afford false speech in order to "protect speech that matters," the Court "has sought to define the accommodation required to assure the vigorous debate on public issues that the First Amendment was designed to protect while at the same time affording protection to the reputations of individuals." *Hutchinson v. Proxmire*, 443 U.S. 111, 133-34 (1979). Through that process of accommodation the Court has formulated separate rules of constitutional privilege for: defamation concerning a public official, *New York Times Co. v. Sullivan, supra*, or public figure,

² Compare *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 152 (1967) (opinion of Harlan, J.):

[S]ome antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy.

While the truth of the underlying facts might be said to mark the line between publications which are of significant social value and those which might be suppressed without serious social harm, and thus resolve the antithesis on a neutral ground, we have rejected . . . the argument that a finding of falsity alone should strip protections from the publisher.

Curtis Publishing Co. v. Butts, supra; defamation concerning a private figure involved in a matter of public concern, *Gertz, supra*; and defamation concerning a private figure and a matter not of public concern, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, — U.S. —, 53 L.W. 4866 (June 26, 1985).

This case in contrast to all the prior *New York Times* cases does *not* involve the question of whether to extend "strategic protection" to admittedly (or assumedly) false speech. Rather, at issue here is one aspect of the procedures for determining whether defamatory speech is true or false—*viz.*, the allocation of the burden of persuasion on the question of truth or falsity. And the issue here can be further refined to the context of defamatory speech on a matter of public concern because that is the factual context in which this case arises: the newspaper articles in question concern (alleged) ties between a liquor store chain and organized crime and the (alleged) use of political connections to enable this chain to continue to do business in violation of state law. The subject matter of these articles thus falls easily within the Court's test for determining "public concern": "'Freedom of discussion; if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'" *First National Bank of Boston v. Billotti*, 435 U.S. 765, 776 (1978), quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

The resolution of the question here does not, in our judgment, turn on the prophylactic considerations that have been determinative in past cases. Rather, as we proceed to show, this case can and should be decided on the basis of more elementary principles of First Amendment jurisprudence.³

³ This is not to deny that a holding requiring defendants to assume the burden of proving truth in order to avoid liability for defamatory statements would have a chilling effect on the dissemination of truthful information. Thus, this case could be decided by

B. We start from the proposition that “[t]o experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends . . . often on how the factfinder appraises the facts.” *Speiser v. Randall*, 357 U.S. 513, 520 (1958). “Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied.” *Id.* And in particular, “[w]here the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation.” *Lavine v. Milne*, 424 U.S. 577, 585 (1976).

In the context of a defamation action, if the burden of persuasion on the issue of truth or falsity were placed on the defendant, a plaintiff would be entitled to recover damages from a speaker based on evidence that a particular statement is injurious to the plaintiff’s reputation but absent any evidence that the statement is false.⁴ Such an allocation of the burden of persuasion would likewise permit recovery where the evidence is in equipoise as to whether the statement is true or false. And such an allocation of the burden of persuasion would increase the

applying the mode of analysis used in *e.g.* *Gertz* and *Dun & Bradstreet*, *viz.*, balancing that chilling effect against the injury to reputation that could result from placing the burden of persuasion on the plaintiff. We believe that the threat to free expression that would result from requiring defendants to prove truth to avoid liability far outweighs the threat to the reputation that would result from requiring plaintiffs to prove falsity in order to establish liability. But as we show in text, it is not necessary to engage in this balancing process to conclude that the First Amendment requires that the burden of persuasion with respect to truth or falsity be allocated to the plaintiff.

⁴ Of course, if the plaintiff were a public official or public figure, or if the speech involved a matter of public concern, the plaintiff also would be required to prove culpability on the defendant’s part. *See* pp. 11-12 *infra*. But as the court below correctly observed, the issues of culpability and truth or falsity are “not synonymous”: “[a] plaintiff can demonstrate negligence [or recklessness] in the manner in which the material was gathered, regardless of its truth or falsity.” App. A-18, A-19 n.13.

risk that damages would be awarded for speech that, in fact, is truthful.⁵ As we proceed to show, the First Amendment does not allow these results.

The First Amendment embodies our “profound national commitment to the principle that debate on public issues should be uninhibited robust and wide-open.” *New York Times*, *supra*, 376 U.S. at 270. “The . . . Amendment, said Judge Learned Hand, ‘presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.’” *Id.*

Given this commitment, the Court has concluded that the interest in truthful expression on matters of public concern outweighs the countervailing interests of those whose reputation may be injured by such expression. “The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.” *Thornhill v. Alabama*, *supra*, 310 U.S. at 101. And this is so regardless of the speaker’s motives in making the truthful publication. That is the central teaching of *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964):

If upon a lawful occasion for making a publication, [the publisher] has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice. . . .

It has been said that it is lawful to publish truth from good motives, and for justifiable ends. *But this rule is too narrow.* If there is a lawful occasion—a legal right to make a publication—and the matter

⁵ Although under the preponderance of the evidence standard applicable in most civil litigation the “litigants . . . share the risk of error in roughly equal fashion,” *Addington v. Texas*, 441 U.S. 418, 423 (1979), that standard tilts the risk of error in the direction of the party upon whom the burden is placed, as that party will lose in every case in which the factfinder is in doubt.

true, the end is justifiable, and that, in such case, must be sufficient. [Emphasis added]

Indeed, it is difficult to imagine what speech the First Amendment would protect if not truthful speech about matters of public concern.⁶

Because true statements on public issues are constitutionally protected, their publication may not form the basis for an award of damages; this is part of what it means to say that the speech is protected. As the Court stated in *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967), "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price . . . Assertion of a First Amendment right is [one such right]." Indeed, that is the central lesson of *New York Times* as well: "civil libel is a form of regulation," thus "what a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." 376 U.S. at 277.

It follows that, in a defamation action, before a defendant/speaker may be required to pay damages on account of his speech, it must be established that the defendant's speech is false and therefore unprotected. And this in turn requires that the plaintiff bear the burden of persuasion on the issue of truth or falsity. Any other rule would permit the State to "exact a price" and thereby sanction speech, through civil damages, ab-

⁶ A similar line has been drawn in the decisions involving commercial speech. The Court has concluded that while truthful advertising is protected, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), false commercial speech is not because such speech does not advance the "First Amendment concern for commercial speech [which] is based on the information function of advertising," *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 562 (1980). The Court has distinguished false commercial speech from false speech on matters of public concern, however, on the ground that the former "is not 'particularly susceptible to being crushed by overbroad regulation,'" *id.* at 562 n.6, and therefore the Court has decided that the Constitution does not require that any "strategic protection" be extended to false commercial speech.

sent proof that—or where the evidence is in equipoise as to whether—the speech stands outside the protective umbrella of the First Amendment.

C. In the context of the rules of culpability formulated in *New York Times* and its progeny the Court has recognized as much. As previously noted, to provide "breathing space" for truthful expression, the Court has extended "strategic protection" to false, defamatory speech if the speech is uttered without fault; the degree of culpability required to cause a defamatory falsehood to lose its "strategic protection" varies with the nature of the falsehood and the subject matter of the speech. Pp. 6-7 *supra*. But whatever the degree of culpability that is required before particular false speech is deemed to be unprotected, the Court has made clear that the burden of proving such culpability rests on the plaintiff.

The roots of this rule can be traced to *New York Times* itself where the Court concluded that "the showing of malice required for the forfeiture of the [constitutional] privilege is not presumed *but is a matter of proof by the plaintiff . . .*" 376 U.S. at 284 (emphasis added). On that basis the Court reversed the judgment for the plaintiffs in that case because "the proof presented to show actual malice lacks the convincing clarity which the constitution demands." *Id.* at 285. In subsequent cases involving public officials and public figures the Court has reiterated and applied this holding to reverse judgments where the plaintiffs had failed to prove malice.⁷ In *Herbert v. Lando*, *supra*, the Court, recognizing that "*New York Times* and its progeny ma[ke] it essential to

⁷ See, e.g., *Time Inc. v. Hill*, 385 U.S. 374, 387-88 (1967); *Beckley Newspapers v. Hanks*, 389 U.S. 81, 83 (1967); *St. Amant v. Thompson*, *supra*, 390 U.S. at 730; *Greenbelt Pub. Assn. v. Bresler*, *supra*, 398 U.S. at 8. We do not here address the question whether falsity, like culpability, must be proven with "convincing clarity," viz., by "clear and convincing evidence," as that question is not presented by this case: the jury here ruled for the defendants pursuant to an instruction requiring that the plaintiffs prove falsity only by a preponderance of the evidence.

proving liability that the plaintiff focus on the conduct and state of mind of the defendant," 441 U.S. at 160, upheld the right of plaintiffs to take discovery from defendants on these issues lest "liability is to be completely foreclosed," *id.* And in *Bose Corp. v. Consumers Union*, — U.S. —, 52 L.W. 4513, 4520 (April 30, 1984), the Court added to the requirement that plaintiffs prove culpability the further requirement that the appellate courts conduct an independent review of the sufficiency of the plaintiff's evidence of fault.

It follows *a fortiori* from the decisions just reviewed that the burden of proving falsity must be placed upon the plaintiff. If a plaintiff is required to prove that a defamatory *falsehood*—which "in and of itself carries no First Amendment credentials," *Herbert v. Lando, supra*, 441 U.S. at 171—does not qualify for the "strategic protection" afforded by *New York Times* and its progeny, necessarily the plaintiff must also be required to prove that a defamatory statement is false and therefore does not qualify for the protection to which truthful speech is entitled in its own right because of its transcendent value in furthering "uninhibited, robust and wide-open debate on public issues." *New York Times, supra*, 376 U.S. at 270.

In other words, before damages may be awarded in a defamation action, the evidence must suffice "to strip the utterances of the First Amendment protection," *Bose Corp., supra*, 52 L.W. at 4520, which at the least means that the evidence must suffice to establish falsity. Proof of falsity thus is required "to cross the constitutional threshold that bars the entry of any judgment" against truthful speech. *Id.*

D. The Pennsylvania Supreme Court viewed the problem here in precisely the opposite way. That court reasoned that because a plaintiff must prove malice or negligence, the plaintiff should not also be required to prove falsity:

The "breathing space" requirement of the First Amendment has not been extended, nor do we believe it can be reasonably extended, to condone or to encourage irresponsible conduct by the media in its exercise of informing the public of newsworthy events. Nor can we conceive of a legitimate constitutionally protected interest in condoning the media's malicious or negligent discharge of this responsibility. [Pet. App. at A-21]

But as we have seen, there is a "legitimate constitutional interest"—indeed, given the values and purposes of the First Amendment, an overriding interest—in the dissemination of truthful information. And that interest exists even where the disseminator did not use due care (or acted recklessly) in ascertaining whether the statement he planned to disseminate is true. Thus, while there is no reason to "condone or to encourage irresponsible conduct by the media," it would be contrary to the First Amendment to punish the publication of truthful information simply because the media did not act responsibly in gathering the information. For First Amendment purposes the requirement of "responsible media conduct" is a means toward the end of truthful media speech, not an end in itself. The court below thus confused means and ends in holding that "irresponsible conduct" in itself causes truthful speech to lose its constitutional protection.

The Pennsylvania Supreme Court also voiced a practical concern about placing the burden of persuasion with respect to the issue of truth or falsity on the plaintiff: "where the [defamatory] accusation is totally general and without the specificity necessary for a response" the plaintiff would be severely handicapped, in that court's view, if he/she had to prove the accusation to be false. Pet. App. A-5. The Pennsylvania Court recognized that this "evidentiary consideration[] . . . cannot support the presumption of falsity if it is offensive to constitutional mandate," *id.* A-8, and hence cannot be dispositive here.

But even on its own terms, that court's argument cannot withstand analysis.

In many if not most cases, the statements which form the basis for a defamation lawsuit will be specific enough that the Pennsylvania Supreme Court's concern simply will not apply; in such cases the plaintiff will be at least as well situated to prove falsity as the defendant will be to prove truth. Moreover, even where a defamatory statement is "totally general," the existence of the discovery process provided for in Pennsylvania civil procedure⁸ ordinarily will enable the plaintiff, by the time of the trial, to obtain "the specificity necessary for a response." And even in the rare case in which such specificity is still lacking at the time of trial, the problem the court below hypothesized could be resolved by placing the initial burden of *production* on the defendant to articulate the factual basis for the defamatory accusation, thereby enabling the plaintiff to respond. Cf. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In no event does the concern the Pennsylvania Supreme Court raised warrant placing the risk of nonpersuasion with respect to truth or falsity on the defendant and thereby permitting libel judgments to be entered where the evidence is in equipoise as to whether the statement is true and therefore entitled to constitutional protection.

E. This conclusion is confirmed by decisions of this Court involving analogous First Amendment questions. For example, in cases involving the regulation of obscenity, the Court has reviewed not only the substantive standards applied by the States but also has concluded that the Constitution "requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression. . ." *Bantam Books Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). In particular, in *Freedman v. Maryland*,

⁸ See Pennsylvania Rules of Civ. Procedure, 4001-4020.

380 U.S. 51, 58 (1965), the Court concluded that "the burden of proving that the [speech] is unprotected expression must rest on the censor." The Court reaffirmed that holding in *Blount v. Rizzi*, 400 U.S. 410, 417 (1971) and again in *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 560 (1975).

Perhaps most closely on point is this Court's decision in *Speiser v. Randall*, *supra*, on which the obscenity cases relied. In *Speiser*, California had denied a tax exemption to certain individuals because they had failed to prove that they had not engaged in certain specified speech. This Court concluded that California had violated the First Amendment in so doing. The Court "assume[d] without deciding that California may deny tax exemptions to persons who engage in the proscribed speech." 357 U.S. at 520. But the Court concluded that California could not impose the burden of persuasion on the individuals to prove that they had not done so:

As cases decided in this Court have abundantly demonstrated, the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. The separation of legitimate from illegitimate speech calls for more sensitive tools than California has supplied. *In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome. There is always in litigation a margin of error, representing error in factfinding, which both parties take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt. Where the transcendent value of speech is involved, due process*

certainly requires in the circumstances of this case that the State bear the burden of persuasion . . .
[357 U.S. at 526-27; emphasis added; citations omitted.]

Here, too, because "the transcendent value of speech is involved," the Constitution requires that he who would exact damages for such speech must bear the burden of persuasion on the issue of falsity which is the first hallmark of whether the speech is protected by the First Amendment or unprotected.

CONCLUSION

For the foregoing reasons, the judgment of the Pennsylvania Supreme Court should be reversed.

Respectfully submitted,

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No. 84-1491

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

PHILADELPHIA NEWSPAPERS, INC., *et al.*,
Appellants,

v.

MAURICE S. HEPPS, *et al.*,
Appellees.

On Appeal from the Supreme Court of Pennsylvania

BRIEF OF AMICUS CURIAE
THE AMERICAN LEGAL FOUNDATION
IN SUPPORT OF APPELLEES

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September 18, 1985

QUESTION PRESENTED

Whether the Constitution precludes a State from enacting a procedural statute which places upon the defendant in a libel suit the burden of proving the truth of the defamatory statements at issue.

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INTERESTS OF AMICUS CURIAE

The American Legal Foundation ("ALF" or "Foundation") is a national, non-profit, public interest legal center organized and existing under the laws of the District of Columbia for the purpose of articulating the broad public interest in courtroom litigation and administrative proceedings affecting the communications media. ALF currently represents the interests of over 40,000 supporters who reside throughout the United States. This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 36.1.

The Foundation is dedicated to ensuring that the media act in a fair and responsible manner in reporting news and information to the public. In this regard, ALF has directed much of its media litigation efforts to challenging inaccurate news broadcasts and to assisting individuals defamed by the media.

For example, over the past three years, the Foundation has been involved in a number of important libel suits in a variety of capacities (co-counsel, of counsel, *amicus curiae*). These include: *Galloway v. CBS, Inc.*, No. C 345900 (L.A. Super. 1983) (private figure action against "60 Minutes" news program concerning report on medical insurance fraud); *Janklow v. Viking Press, et al.*, No. 14657, argued Jan. 9, 1985 (S.Ct. S.D.) (suit by South Dakota Governor raising neutral reportage privilege); *Lewis, et al. v. Port Packet*, 325 S.E.2d 713 (Va. 1985), petition for cert. denied, 53 U.S.L.W. 3911 (U.S. July 1, 1985) (No. 84-1723) (private figure libel action concerning standard of proof prerequisite to punitive damage award); *Tavoulareas v. Washington Post, et al.*, No. 83-1605 (D.C. Cir.), *reh'g en banc granted* (June 11, 1985) (business executive's suit over newspaper allegations of corporate nepotism); and *Anderson v. Liberty Lobby*, Docket No. 84-1602, cert. granted, 105 S.Ct. 2672 (1985) (whether the "clear and convincing" constitutional standard applies at the summary judgment stage of a public figure libel action).

In addition to the Foundation's regular participation in libel litigation, ALF has also established the nation's only existing Libel Prosecution Resource Center to assist victims of media defamation in suits against the press. Postell, *News Media Under Scrutiny in the '80s*, Trial Magazine, February, 1985 at 72-73. The Center, which began operation in August, 1984, offers a collection of sample briefs, complaints and other types of libel-related pleadings and materials to interested individuals.

Working through its Libel Center, ALF has succeeded in organizing a network of libel plaintiffs' attorneys in approximately 40 states who accept referrals from the Foundation when requests for legal assistance are received by potential libel litigants situated in their locality. The ALF Center also publishes original legal studies on various aspects of defamation law. See B. Fein, *New York Times v. Sullivan: An Obstacle to Enlightened Public Discourse and Government Responsiveness to the People* (American Legal Foundation, No. 1, 1984).

Finally, ALF has submitted both oral and written testimony to the U.S. Congress concerning the current state of libel law and how it may best be reformed. See *Hearings on Libel Law and the Administration of Justice of the House Committee on the Judiciary*, 99th Cong., 1st Sess. (June 27, 1985).

Thus ALF's expertise in libel law is well documented. The Foundation has expended an enormous amount of time, effort and money to assist libel plaintiffs in the belief that the public interest is ill served by a legal system that effectively renders both private and public figures powerless to protect their good names against unjust media defamation.

The constitutional issues presented in the instant proceeding directly implicate these concerns. The State of Pennsylvania has wisely chosen to protect its private citizens from defamatory falsehoods causing injury to reputation by placing the burden of proving the truth of the published defamation upon the alleged defamer.¹ The

¹ The specific provision of the burden of proof statute being challenged provides that: "In an action for defamation, the defendant has the burden of proving, when the issue is properly raised, the truth of the defamatory communication." 42 Pa.C.S.A. § 8343(b)(1). This section is a codification of the State of Pennsylvania's decisional law on this subject. *Hepps v. Philadelphia Newspapers, Inc.*, 485 A.2d 374, 377 (Pa. 1984). The decisional law, in turn, springs from the common law presumption that "in

State of Pennsylvania clearly has the authority to enact this type of provision. Nothing in the Constitution or in the opinions of this Court imposes upon the states any federal substantive limitations as to how, within their own judicial systems, the burden of proving truth or falsity in a libel action involving private citizens must be allocated. Indeed, within "the discrete area of purely private libels," just the contrary is true. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

Not only has this Court consistently reaffirmed the states' strong and legitimate interest in safeguarding private figure reputations, but it has repeatedly rejected all invitations to expand the substantive protections afforded libel defendants in *New York Times* and its progeny to encompass purely procedural determinations such as burden of proof allocations.

Appellants and their legion of supporting media *amici* seek to obscure the paramount considerations of fairness to private figure libel litigants and respect for state sovereignty in our federalist system of government that have undergirded nearly every libel decision issued by this Court in the years subsequent to *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Their method of obfuscation is easily discernible. It consists, at bottom, of an unreasonably expansive reading of *Gertz* together with the by now *de rigueur* "chilling effect" rhetoric and a plethora of inapposite analogies to burden of proof requirements in other areas of the law.²

actions for defamation, the general character or reputation of the plaintiff is presumed to be good." *See, id.* and cases cited therein.

² For example, appellants vigorously contend that the Pennsylvania burden of proof statute aiding private figure libel plaintiffs is legally equivalent to the burden of proof allocations or presumptions struck down by this Court in criminal or obscenity prosecutions. *See* Brief of Appellants at 26, 27 and 33. Ignoring the obvious distinction that the cases alluded to by appellants involved *Government* suppression of allegedly criminal speech, *Speiser v. Randall*, 357 U.S. 513 (1958); *Freedman v. Maryland*, 380 U.S. 51

But, to reiterate, the Court's touchstones when assessing the First Amendment's reach in private figure libel actions have always been fairness and federalism. In place of these solidly accepted principles, appellants would have this Court further insulate the media from liability and further usurp traditional state prerogatives by fashioning a new constitutional rule forever shifting the burden of proving truth from those who negligently publish to those who are innocently injured. However, such a demand proves too much.

Accordingly, ALF's brief will contribute to the just disposition of this matter by demonstrating how appellants' call for the further constitutionalization of state libel law is unsupported in either law or logic and must, therefore, be rejected.

STATEMENT OF THE CASE

In the interests of brevity and judicial economy, *amicus curiae* adopts the statement of the case set forth in the brief of appellees.

SUMMARY OF ARGUMENT

The Supreme Court of Pennsylvania correctly upheld the constitutionality of 42 Pa.C.S. Sec. 8343(b)(1) which

(1965); or *Government*-deprivation of fundamental liberty interests, *Tot v. United States*, 319 U.S. 463 (1948); *Mathews v. Eldridge*, 424 U.S. 319 (1976), whereas here, the state involvement is negligible, the fact remains that in these "analogous" cases the suppression of speech or deprivation of individual liberty was inherent in the procedural allocation of proof or persuasion. In the instant case, however, there must also be a finding of fault, i.e., negligence, in addition to falsity, prior to any award of damages. Moreover, given that the jury's finding of falsity automatically strips the libel defendant's communications of any constitutional protection, there can be no danger of suppression of protected speech. *See, e.g., Dun & Bradstreet v. Greenmoss Builders, Inc.*, 53 U.S.L.W. 4866, 4871 (U.S. June 25, 1985) (White, J., concurring) ("Despite our ringing endorsement of 'wide-open' and 'unhibited' debate. . . we cannot fairly be accused of giving constitutional protection to false information as such.")

places the burden of proving the truth of a defamatory communication on the libel defendant. *Gertz v. Robert Welch, Inc.* does not mandate a contrary conclusion. *Gertz* recognized that the states have a legitimate and substantial interest in protecting the reputations of their private citizens. Moreover, it specifically held that the only restraint upon the states mandated by the First Amendment in civil actions for libel brought by private figures for compensatory damages is that they may not impose liability without fault. The Pennsylvania burden of proof statute is separate and distinct from the constitutionally required fault standard. It is merely a reasonable procedural mechanism for allocating who has the burden of proving the truth or falsity of the defamatory communication. As such, it in no way implicates the substantive constitutional rights afforded libel defendants under *New York Times* and its progeny.

Because appellants refuse to give *Gertz v. Robert Welch, Inc.* its natural and obvious reading and because they openly call upon this Court to impair the legitimate power of the states to protect private figure reputations, their claims must be rejected.

ARGUMENT

This case presents a procedural question of first impression: whether the Constitution precludes a State from enacting a procedural statute which places upon the defendant in a libel suit the burden of proving the truth of the defamatory statements at issue.³

Decisions by this Court seeking to define the proper balance between First Amendment guarantees and state libel laws have, in the years subsequent to *New York Times Co. v. Sullivan*, significantly curtailed the ability

³ In addition to Pennsylvania, five other states have apparently chosen to place the burden of proving truth upon the libel defendant. See, Brief of Appellant at 20 fn. 9.

of the states to protect the reputational rights of all of their citizens. However, this Court has not allowed the federalization of state libel law to proceed unabated. Although strict constitutional limitations have been established whenever public officials or public figures seek redress in state courts, the same cannot be said of private figures.

This Court has consistently recognized that "different [constitutional] interests may be involved where purely private libels, totally unrelated to public affairs are concerned." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Accordingly, the Court has held that the states retain a legitimate and substantial interest in protecting the reputations of private citizens. It has granted them wide latitude to enact laws solicitous of private figure reputations. Moreover, it has rejected all attempts, whether in the public or private figure context, to constitutionalize major procedural aspects of state libel law.

The Pennsylvania burden of proof statute falls well within the parameters delimited by this Court in which state libel action is valid. The statute at issue works to safeguard private figure reputations. It is entirely procedural. Most important, it fully comports with the federal rule articulated in *Gertz* that so long as they do not impose liability without fault, the states have unfettered discretion to protect private figure reputations.

THE PENNSYLVANIA BURDEN OF PROOF STATUTE IN DEFAMATION ACTIONS IS FULLY COMPATIBLE WITH PAST LIBEL DECISIONS OF THIS COURT

In *New York Times Co. v. Sullivan*, this Court, writing on a "clean slate," concluded that "libel can claim no talismanic immunity from constitutional limitations" and made significant First Amendment inroads on the ability of the states to protect the reputations of public offi-

cials against critics of their official conduct. 376 U.S. 254, at 299 and 269.

The state libel law at issue in *New York Times* provided that if a publication was "libelous per se," then the defendant had "no defense" as to the stated facts unless he could persuade the jury that "they were true in all their particulars." *Id.* at 267. The Court rejected such a rule as being repugnant to the First and Fourteenth Amendments because "would-be critics of official conduct may be deterred from voicing their criticism." *Id.* at 279. In other words, the availability of the defense of truth, standing alone, was insufficient to negative the self-censorship the Court held would result from the seditious libel aspects of the common law of defamation.

For these reasons, the Court issued a new constitutional rule prohibiting the states from allowing a public official to recover damages for a defamatory falsehood relating to his official conduct "unless he proves that the statement was made with 'actual malice'—that is with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80.

New York Times clearly concerned libel litigation initiated by public officials acting as surrogates for the state. It did not address the question of whether the Constitution requires public officials to bear the burden of proving falsity in addition to actual malice as part of their prima facie case. This is because the statements at issue in *New York Times* were concededly inaccurate. *Id.* at 258-259.⁴

⁴ To the extent that dicta in subsequent cases may be read to suggest that the requirement of proving falsity rests upon the plaintiff, these cases also involved either public officials or what were later denominated as public figure libel plaintiffs. See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 85 (1964); and *Herbert v. Lando*, 441 U.S. 153, 175-76 (1979). Thus they have no applicability to the instant case, which involves a private figure libel plaintiff.

In the years immediately following *New York Times*, this Court struggled between maintaining *New York Times*' public/private figure distinction or adopting a different and much broader subject-matter constitutional standard. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). Finally, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) the Court explicitly rejected the subject matter analysis of *Rosenbloom* and adopted a test which focused on the status of the plaintiff.⁵

The approach outlined in *Gertz* was viewed as a better way to achieve a balance between the constitutional guarantees of free speech, on the one hand, and the states' interest in compensating private individuals for harm from defamatory falsehoods, on the other. The expansive subject matter test called for by a plurality of the members of the Court in *Rosenbloom* was rejected because it would unduly trammel upon the legitimate interests of the states in protecting their private citizens. 418 U.S. at 346.

The *Gertz* court justified its position by noting crucial distinctions between private libel litigants and public officials or public figures who sue to vindicate their reputations. For example, private persons cannot gain access to the media as easily as public persons and are thus unable to counteract defamation by "self-help." This renders the state interest in protecting private persons who are vulnerable to injury more substantial. Also, private persons have not accepted the consequences of public notoriety to the same extent as public officials and public

⁵ Although the *Rosenbloom* opinion has become something of a derelict upon the sea of libel law, it is important to note in passing that this Court was similarly examining the constitutional validity of Pennsylvania's libel law. Moreover, the Court specifically addressed the fact that "Pennsylvania has enacted . . . the [First] Restatement [of Torts] provisions on burden of proof, which place the burden . . . of truth on the defendant," without even pausing to raise an eyebrow. 403 U.S. 29, 37-38.

figures. In other words, they have not assumed the risk of being subject to certain levels of defamatory falsehoods concerning their activities. Again, this makes it appropriate for the states to retain or devise less stringent means for allowing them recovery in court. See generally, *Gertz*, 418 U.S. at 343-345.

For the above reasons, the Court retreated from federalizing the law of defamation any further. It concluded that "the States should retain *substantial latitude* in their efforts to enforce a legal remedy for defamatory falsehood[s] injurious to the reputation of a private individual." *Id.* at 345-46 (emphasis added). The Court therefore established a less stringent constitutional standard, below which the states may not fall, in order to ensure that First Amendment guarantees are protected:

We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood[s] injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation.

Id. at 342-48 (footnote omitted).

The Court added some additional limitations on the power of the states to protect private citizens from defamation. For example, it held that a state's interest in compensating a defamed plaintiff extends only to recovery for "actual injury." It also conditioned the recovery of punitive damages by a private figure upon a showing of *New York Times* "actual malice." *Id.* at 350.

The primary limitation placed upon the states by *Gertz*, however, remained the fault requirement. As long as a

state has at least a negligence standard of care to govern libel suits initiated by private citizens, the Court stated that the constitutional guarantees of free speech would be fully satisfied.

It is clear that *Gertz* and the cases following it did not contract the wide latitude afforded states in private figure actions outside the constitutional standard of care requirement. On the contrary, this Court has repeatedly reiterated that "*Gertz* provides an adequate safeguard for the constitutionally protected interests of the press and affords it a tolerable margin for error by requiring some type of fault." *Time, Inc. v. Firestone*, 424 U.S. 448, 457 (1976). Cf., *Dun & Bradstreet v. Greenmoss Builders*, 53 U.S.L.W. 4866, 4869 ("... the role of the Constitution in regulating state libel laws is far more limited when the concerns that activated *New York Times* and *Gertz* are absent." (footnote omitted)).

Stated differently, this Court's decisions from *Gertz* through *Dun & Bradstreet* have held that the Constitution requires a finding of some degree of fault as a precondition to a defamation award to a private figure plaintiff. Other than this single constitutional requirement, the states are free to do as they please, as long as such action is reasonable. This is particularly true when it comes to enacting or enforcing purely procedural mechanisms in libel litigation which may prove onerous to libel defendants. Thus, for example, this Court unanimously rejected the proposition that traditional state jurisdictional statutes may be unconstitutional as applied to libel defendants:

Moreover, the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. See *New York Times, Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323,

94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). To reintroduce those concerns at the jurisdictional stage would be a form of double counting. We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws. *See, e.g., Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 610 L.Ed.2d 115 (1979) (no First Amendment privilege bars inquiry into editorial process). *See also, Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9, 99 S.Ct. 2675, 2680 n.9, 61 L.Ed.2d 411 (1979) (implying that no special rules apply for summary judgment).

Calder v. Jones, 104 S.Ct. 1482, 1488 (1984).

The Pennsylvania burden of proof standard under attack in this case is purely procedural. It in no way affects or subverts the fault requirement mandated by *Gertz*. In Pennsylvania, if a private figure libel plaintiff is to maintain a cause of action against a libel defendant, he must show fault. This is all that the Constitution demands.

Appellants nevertheless contend that the issue of falsity is somehow inextricably linked to proof of fault. In their expansive reading of *Gertz*, wherever the Court used the word fault, it actually intended to say both "falsity and fault." Thus, their rewording of *Gertz*'s holding would be to the effect that: "so long as they do not impose liability without *requiring the libel plaintiff to prove both falsity and fault*, the States may define for themselves the appropriate standard of liability" And they would have this Court invalidate the Pennsylvania burden of proof statute because it contravenes this "obvious" mandate.

But this argument proves too much. It is incredible to believe that the Court in *Gertz* refused to say exactly what it meant or silently took it for granted that readers

of its opinion would presume the word fault to denote both fault and falsity.

This Court has made it patently clear in its libel decisions both prior and subsequent to *Gertz* that it is the *conduct* of libel defendants, that is, the degree of fault manifested in publishing false and defamatory information, around which the constitutional protections have been erected. Thus, for example, in *Curtis Publishing Co. v. Butts*, Justice Harlan remarked:

Our resolution of *New York Times Co. v. Sullivan*, . . . , makes clear . . . that neither the interests of the publisher nor those of society necessarily preclude a damage award based on improper conduct which creates a false publication. *It is the conduct element, therefore, on which we must principally focus*, if we are successfully to resolve the antithesis between civil libel action and the freedom of speech and press.

388 U.S. 131, 152-153 (1967) (emphasis added).

Similarly in *Herbert v. Lando*, Justice White, speaking for the Court, wrote:

. . . *New York Times* and its progeny made it essential to proving liability that the plaintiff focus on the *conduct* and state of mind of the defendant. To be liable, the alleged defamer of public officials or of public figures must know or have reason to suspect that his publication is false. *In other cases proof of some kind of fault, negligence perhaps, is essential to recovery.*

441 U.S. 153, 160 (emphasis added).

Recognizing this fatal flaw in their argument, appellants are forced to resort to fast expository footwork in a misbegotten attempt to direct the Court's attention away from these elementary propositions. Specifically, they attempt to argue that the Pennsylvania burden of proof statute will "inevitably" result in the suppression

of truthful speech. Brief of Appellant at 25, 28-31. In a close case, for example, when the evidence is in equipoise, appellants contend that the burden of proof provision will prompt the jury to declare the speech at issue "false", when in reality it may just as well be "true."

The plain fact, however, is that this is a worst case scenario. Most evidentiary experts who have considered this question have stated that "cases where the trier's mind is in equipoise at the end of its deliberations . . . do[] not occur very often." See e.g., James, *Civil Procedure* § 7.9, 260 (1965). But even were such extreme situations to occur regularly in libel litigation—a dubious proposition at best—there is nothing unconstitutional about a state legislature shifting the burden of proving truth onto libel defendants for reasons of convenience, fairness and/or policy.

In the State of Pennsylvania's case, it is eminently sensible for it to place such a burden on libel defendants, the vast majority of which are media organizations, because of the state's press shield law. As the Supreme Court of Pennsylvania noted, the Pennsylvania shield law has been broadly interpreted:

As a consequence . . . the plaintiff in a civil libel action is restricted in his ability to prove the falsity of the defamatory statement. He is denied access to the sources of information on which the statement is based. The defendant . . . is therefore in a better position to prove the truth of the defamatory statement.

Hepps v. Philadelphia Newspapers, 485 A.2d 374, 387 (Pa. 1984).

In addition, appellants are simply incorrect in arguing that negligence necessarily follows from falsity. Brief of Appellants at 19-22. As the lower court noted, negligence can be demonstrated in such a way that the issue of truth or falsity never arises. *Hepps v. Philadelphia*

Newspapers, 485 A.2d at 385 (Pa. 1984) fn. 13. In such an instance, although the presumption of falsity may benefit the plaintiff, the burden will still remain on him to prove negligence in order to prevail. Moreover, the Supreme Court of Pennsylvania has interpreted the burden of proof provisions at issue in such a manner that in those rare instances where it is necessary for the libel plaintiff "to prove falsity to establish the negligence of the defendant, it is then the burden of the plaintiff to do so." *Id.*

To reiterate, the constitutional limitations on the states announced in *Gertz* are a prohibition against imposing liability without fault and the requirement that compensatory awards be supported by competent evidence concerning injury. Nothing in *Gertz* or the Constitution requires imposing further limitations on the states. "The First and Fourteenth Amendments do not impose upon the States any limitations as to how, within their own judicial systems, factfinding tasks shall be allocated." *Time, Inc. v. Firestone*, 424 U.S. 448, 461 (1976).

CONCLUSION

In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 262 (1974), Justice White remarked that: ". . . [W]e have cherished the average citizen's reputation interest enough to afford him a fair chance to vindicate himself in an action for libel . . . [H]e has had at least the opportunity to win a judgment." However, appellants and their army of supporting media *amici* now seek to make the opportunity for a "fair chance" impossible by having this Court invalidate a reasonable procedural statute based upon centuries of common law experience and designed solely to assist private citizens vindicate their reputations.

Invalidation of the Pennsylvania burden of proof statute would undercut each state's legitimate and substan-

tial interest in this area. Such an action would be a severe blow to the concept of federalism, one which would also "effect substantial depreciation of the individual's interest in protection from . . . harm, without any convincing assurance that such a sacrifice is required" *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976).

Accordingly, the judgment of the Supreme Court of Pennsylvania declaring the Pennsylvania burden of proof statute in defamation actions to be constitutional should be affirmed.

Respectfully submitted,

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